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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

October Term, 1935

No. 350

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NORTHWESTERN BELL TELEPHONE COMPANY,
APPELLANT,

VS.

NEBRASKA STATE RAILWAY COMMISSION,
APPELLEE.

---

## BRIEF OF APPELLEE

---

WM. H. WRIGHT, Attorney General of Nebraska,
EDWIN VAIL, Assistant Attorney General,
*Attorneys for Appellee.*
JOHN E. BENTON, *of Counsel.*

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## STATEMENT

By reason of the fact that the statement of the case made by appellants omits a number of matters which we consider material to the consideration of the questions pre-

sented by the record, and particularly because we believe that appellant has failed properly to construe and interpret the proceedings had by the state commission, we feel impelled to include what we deem to be a complete and accurate statement of the case in this, our own, brief.

### Nature of the Case

Appeal by the Northwestern Bell Telephone Company from a decision of the Supreme Court of Nebraska affirming an order of the Nebraska State Railway Commission directing the Northwestern Bell Telephone Company to use a composite depreciation rate of 3½% upon all of its depreciable property in Nebraska, including right of way, for the year 1934 for the purpose of accounting and reporting to the Nebraska State Railway Commission.

## SOURCE AND EXTENT OF JURISDICTION OF THE STATE COMMISSION

The jurisdiction of the Nebraska State Railway Commission has its origin in Section 20, Article IV of the Constitution of the State of Nebraska, which provides, amongst other things:

> "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law, but in the absence of specific legislation the commission shall exercise the powers and perform the duties enumerated in this provision."

In the absence of specific legislation limiting its power, the Railway Commission, under this section, has all the power in the regulation of rates, service and general control over common carriers that the people themselves could

exercise. *In re Lincoln Traction Company,* 103 Neb. 229; *In re Yellow Cab & Baggage Company,* 126 Neb. 138.

Telephone companies have been held by the Nebraska Supreme Court to be common carriers under the constitutional provision above referred to, and to be subject to regulation by the Commission. *Farmers & Merchants Telephone Co.* v. *Orleans Community Club,* 116 Neb. 633; *Hooper Telephone Co.* v. *Nebraska Telephone Company,* 96 Neb. 245; *Marquis* v. *Polk Co. Telephone Co.,* 100 Neb. 140; *Blackledge* v. *Farmers Independent Telephone Company,* 105 Neb. 713.

The Nebraska State Railway Commission has independent legislative, judicial and executive or administrative powers so far as necessarily involved in the regulation of rates, service and general control of common carriers. *In re Lincoln Traction Company,* 103 Neb. 229.

## NATURE OF THE PROCEEDINGS BEFORE THE STATE COMMISSION

On November 29, 1933, the Commission entered its general order No. 59 (R., pp. 2 to 10). This order was made in connection with an opinion or report stating the purpose of the Commission and containing recitals and findings on which the order is based.

This opinion, together with the findings and order, initiated the proceedings which culminated in the legislative order fixing the depreciation rate for 1934 of which complaint is made.

**Opinion Discusses accounting Regulations Prescribed by Interstate Commerce Commission to Become Effective January 1, 1935**

In its opinion (R., pp. 2-9), the Commission examines the provisions of the Interstate Commerce Act under which the Interstate Commerce Commission undertook to prescribe a uniform system of accounts for telephone companies.

It is pointed out that while the Interstate Commerce Commission had authority to, and did, prescribe a uniform system of accounts for telephone companies as early as January 1, 1913, it was not until the enactment of the Transportation Act of 1920, by which Section 20 of the Interstate Commerce Act was amended, that any power was attempted to be bestowed by Congress upon the Interstate Commerce Commission to fix or prescribe depreciation charges. The Interstate Commerce Commission, after extensive hearings, entered an order prescribing rules and regulations whereby the Interstate Commerce Commission might eventually pass upon and fix and prescribe depreciation charges for telephone companies reporting to it. *Depreciation Charges for Telephone Companies*, Docket No. 14700, 177 I. C. C. 351. The rules and regulations prescribed by the Commission were incorporated in and made a part of the "First Revised Issue" of the Uniform System of Accounts for Telephone Companies, which was issued November 12, 1932, by the Interstate Commerce Commission, and became effective January 1, 1933, as to Class A companies, that is,—those having average annual operating revenue exceeding $100,000.00 (R., p. 204), which included the appellant.

It was provided by the Interstate Commerce Commission, 177 I. C. C. 351, that for the assistance of the Interstate Commerce Commission in prescribing depreciation charges, Class A telephone companies should file with the state commission "having jurisdiction over the particular company" (177 I. C. C. 446) their estimates of the composite annual percentage rates considered applicable to the book cost of each class of depreciable telephone plant owned or used by the company (R., pp. 210-211), together with supporting data.

These estimates and percentages were required to be filed in the first instance not later than September 1, 1932, and the revised rules were to be effective commencing January 1, 1933; however, by subsequent order, Class A companies were required to file their estimates and supporting data with the State Commissions not later than August 1, 1934, and the date as of which depreciation accounting was prescribed became effective January 1, 1935, as to Class A companies (R., p. 4).

**Request of Interstate Commerce Commission for Information As to 1934 Rates**

For the year 1934, the Interstate Commerce Commission, through its Bureau of Accounts, issued its Depreciation Section Series Circular No. 7, in part as follows:

> "In order that the Commission may be informed as to the rates contemplated for use by the respective companies for the year 1934, each Class A and Class B telephone company is requested to submit not later than March 1, 1934, a schedule of the rates by primary accounts which it proposes to apply during that year, together with a statement of the estimated service lives and salvage values upon which such rates are based.

"In view of the fact that the estimated rates covered by the schedules to be submitted by Class A companies, August 1, 1934, and by Class B companies August 1, 1935, must be accompanied by the necessary supporting data, and it is assumed that the preparation of these is receiving appropriate consideration at this time, the only requirement with respect to the rates submitted in response to this request is that the service lives and salvage values shown shall be based upon the best information readily available. In order words, for the purpose of the returns (fol. 10) to be made under this circular the details supporting the service lives and salvage values used will not be required" (R., p. 5).

**General Order No. 59 Relates to Two Subjects**

It is, therefore, apparent that as matters stood on November 29, 1933, the date of General Order No. 59, there were two subject-matters before the Nebraska State Railway Commission, which are considered in the said General Order No. 59.

**First Subject: Proceedings in cooperation with the I. C. C. under its orders in Docket 14700 to fix 1935 rates of depreciation.**

The first subject-matter of the order is the receiving of the estimates and supporting data required to be furnished by telephone companies under the provisions of Instruction 80 of the First Revised Issue of the Uniform System of Accounts for Telephone Companies, prescribed by the Interstate Commerce Commission (R., p. 210). This instruction prescribed that the estimates and data should be filed with the state commissions and their recommendations forwarded to the Interstate Commerce Commission for action

thereon. The effective date for filing the estimates and supporting data, as fixed by the Interstate Commerce Commission, was August 1, 1934, and the same would be applicable to rates which might be fixed when the regulations for depreciation accounting became effective on January 1, 1935 (R., p. 4).

**Second Subject: Proceedings by the Nebraska State Railway Commission to fix the 1934 depreciation rates.**

There is, however, an additional subject-matter treated of by the order, which had its origin in Depreciation Section Series Circular No. 7 issued by the Interstate Commerce Commission.

This circular requested that schedules of depreciation rates and a statement of the estimated service lives and salvage values upon which the rates were based, be submitted not later than March 1, 1934, "in order that the Commission may be informed as to the rates contemplated for use by the respective companies for the year 1934" (R., p. 5).

The requirements as to estimates differed materially from the requirements imposed under Instruction No. 80 of the First Revised Issue of the Uniform System of Accounts for Telephone Companies in that no supporting data was required.

Again, the recommendations of the state commissions were not asked for.

It is possible that appellant is correct when it states (Brief, p. 5) that it was not intended that these schedules

be filed with the state commissions, and that the state commission erred in so interpreting the circular.

However, be that as it may, there can be no doubt from the order that the state commission regarded the schedules and data requested to be filed March 1, 1934, as having to do, not with the proceeding pending before the Interstate Commerce Commission, for the fixing of rates under the revised accounting rules effective January 1, 1935, but as having to do solely with depreciation charges for the year 1934.

Assuming that the determination of depreciation charges upon property located in Nebraska and used in intrastate operations rested with the state commission (R., p. 8), it required all Class A telephone companies to file with it on or before March 1, 1934, the same data as the Interstate Commerce Commission had requested (R., p. 9).

That the purpose of requiring this filing was as a preliminary step to establishing the 1934 depreciation charges does not admit of any doubt.

Preliminary to its finding and orders with regard to the showing thus required to be filed by Class A telephone companies on or before March 1, 1934, with regard to their depreciation rates for that year, the Commission discussed the question of possible conflicting jurisdiction between the Interstate Commerce Commission and the State Commission (R., p. 6).

It was pointed out that the Interstate Commerce Commission had for many years required telephone companies to furnish annual reports under its Uniform System of Ac-

counting; that the Nebraska State Railway Commission had not attempted to set up an accounting system of its own, but had allowed telephone companies to file with it copies of the reports filed with the Interstate Commerce Commission (R., p. 7).

The opinion recites again the pendency of the proceeding before the Interstate Commerce Commission in Docket No. 14700 to prescribe depreciation charges, and calls attention to the fact that the effective date for filing schedules of percentages and supporting data in that proceeding had been postponed, as to Class A companies, to August 1, 1934 (R., p. 7).

It is then stated:

> "To establish percentage rates for 1934, Circular No. 7 provides that percentage rates and certain available data must be filed with the state commissions on or before March 1, 1934" (R., p. 7).

It may be that, as appellant suggests (Brief, p. 5), the commission erred in interpreting Circular No. 7 to require filing with the state commission. This is immaterial. What is material, though, is the clearly expressed thought that the purpose was to establish depreciation charges for 1934 under a proceeding independent of the proceeding then pending before the Interstate Commerce Commission to establish rates to be effective after January 1, 1935.

That the state commission proposed to carry out this purpose is made more certain by the subsequent recitals and findings of the Commission.

The Commission stated:

> "In view of the fact that nearly all telephone service is intrastate, and the further fact that the State Commissions have regulatory power to fix reasonable rates for service, it is our opinion and we so find that Congress did not intend to authorize the Interstate Commerce Commission to prescribe depreciation rates, except for the sole purpose of establishing uniformity in depreciation accounting to the Interstate Commerce Commission, and for the purpose of aiding the State Commissions in fixing a depreciation rate. In other words, the Interstate Commerce Commission has the final word on depreciation accounting for the purpose of a uniform system of accounting to the Interstate Commerce Commission, and the State Commissions have the final word in fixing depreciation percentages as far as its accounting and reporting systems are concerned. It was clearly not the intention of Congress to deprive the State Commissions of their regulatory power to fix reasonable telephone rates." (R., pp. 7 and 8.)

**Finding As to 1934 Rates**

The Commission then made a finding as to the 1934 rates of depreciation, as follows:

> "An order should be entered directing all Class A and Class B telephone companies to file with this Commission, as soon as possible, and not later than March 1, 1934, the depreciation percentages they propose to use for 1934, with such available supporting data as is required by Schedules 1 and 2 attached to Depreciation Section Series Circular No. 7." (R., p. 8.)

**Finding As to 1935 Rates**

A further finding was made with regard to the estimates and supporting data required to be filed with the State

Commissions for recommendation to the Interstate Commerce Commission in connection with the 1935 rates of depreciation, which is as follows:

> "Another order should be entered directing all Class A telephone companies to file with this Commission, not later than August 1, 1934, their proposed depreciation rates for the year 1935, as required by the Interstate Commerce Commission in Docket No. 14700, and all supplemental orders pertaining thereto. A like order should be entered for all Class B telephone companies, except as to the respective dates." (R., p. 8.)

**Order As to 1934 Rates**

The Commission made the following order:

> "1. That all Class A and Class B telephone companies be and they hereby are ordered to file with this Commission not later than March 1, 1934, a schedule of depreciation rates by primary accounts, which they propose to apply for the year 1934, together with such supporting data as is required by the Interstate Commerce Commission in Schedules 1 and 2 attached to Circular 7, Depreciation Section Series." (R. p. 9.)

**Order As to 1935 Rates**

Other orders were entered with respect to the estimates and supporting data required to be filed August 1, 1934, in accordance with the orders in Docket 14700 (Depreciation Charges of Telephone Companies, 177 I. C. C. 351) with reference to depreciation rates for 1935 (R., p. 9).

**Finding and Order As to Accounting Procedure**

The Commission made the following finding:

> "The Commission is of the opinion and so finds that the procedure adopted by the Interstate Commerce

> Commission, for prescribing depreciation rates, should be adopted by this Commission, except that when the Interstate Commerce Commission shall have prescribed the rate of depreciation after hearings by this Commission and the recommendations of this Commission thereon, the said rate (fol. 14) should not be final, as far as accounting to this Commission is concerned, but subject to review by this Commission and a final order entered thereon." (R., p. 9.)

An order based on this finding was entered (R., p. 9).

**Schedule and Estimates Filed As to 1934 Rates**

In accordance with General Order No. 59, the Northwestern Bell Telephone Company, on February 28, 1934, filed separate schedules of its property included in telephone plant accounts as of January 1, 1934, and depreciation percentages for use during the year 1934 (R., pp. 10 to 17).

**Further Order of Commission With Respect to 1934 Rates**

On March 6, 1934, the Commission entered a further order, which is as follows:

> "Pursuant to our order of November 29th, 1933, the Northwestern Bell Telephone Company has filed with the commission its schedule of depreciation rates by primary accounts which it proposes to apply for the year 1934, together with the supporting data as required by the Interstate Commerce Commission in Schedules 1 and 2 of Circular 7, Depreciation Section Series, and the same having been examined by our Engineering staff and not being fully satisfied with the rates proposed, we find that the cause should be set down for hearing for oral examination of the members of respondent's staff, who prepared said schedules, and for the introduction of such evidence the Com-

mission may desire to submit with opportunity of objections and cross-examination by respondent.

"It is therefore ordered that the cause be set down for hearing on the 19th day of March, 1934, at the hour of 10 o'clock a. m., at the Commission's hearing room in the state capitol." (R., pp. 17 and 18.)

## HEARING HAD UNDER ORDER OF MARCH 6, 1934

On March 19th and 20th a hearing was had in pursuance of the order of March 6th.

Appellant's brief contains some inaccurate statements as to what took place at the hearing in question, which should be corrected at this point. The brief states (p. 9):

"It was stated in view of the date thus fixed"—(to-wit: August 1, 1934, the date for filing data for 1935 depreciation)—"this material was not ready for presentation and consequently appellant would not undertake at that time to make any complete affirmative showing in support of its rates of depreciation, but construed the order of March 6th as directing the production of the persons who had compiled the summarized schedules required to be filed March 1, and that such witnesses were present and ready to answer such questions as might be asked them."

Again, it is stated (pp. 9-10):

"This hearing occurred on March 19th and March 20th and was confined to the answering of questions and the making of such explanations as the Commission and its engineers requested of these witnesses."

Neither of these statements is borne out by the record.

**Scope of Hearing and Nature of Evidence Presented**

When the hearing was convened on March 19, 1934, the appellant, Northwestern Bell Telephone Company, appeared by its attorneys and produced witnesses for examination by the Commission as to the data contained in the schedules of property and computation of depreciation percentages filed by them as aforesaid (R. p. 43).

The presiding Commissioner asked:

> "What order of procedure would you think proper, gentlemen?" (R., p. 43.)

To which counsel for appellant responded by specifying the witnesses who were present and stating that counsel would be glad to have the Commission ask any questions that they would care to, and would be glad to have the witnesses answer and furnish any information they could (R., pp. 43-44).

Mr. Granfield, the Inventory and Costs Engineer of the Northwestern Bell Telephone Company, under whom the rates of depreciation were compiled, was placed on the stand (R., p. 44), and after having answered a few preliminary questions as to his connection with the company, experience and familiarity with the data submitted (R., pp. 45 and 46), the question of procedure arose and it was stated by Mr. Forbes, Chief Engineer for the Commission, who conducted the examination of the witnesses on the part of the Commission, that he thought there should be a complete showing at one time, and that he understood that the company had supporting data which they were now preparing. Counsel for the telephone company stated that this was true, but that the supporting data was not all consolidated, which was aimed to be done so that the same

might be filed August 1, 1934, in accordance with the order of the Interstate Commerce Commission (R., p. 46).

The presiding Commissioner, Mr. Bollen, then stated:

> "I think, Mr. Forbes, your position would be good if this was August 1st instead of March 1st. This is simply for the fixing, of course, of the 1934 rate, and the Interstate Commerce Commission and we did not require as full a showing at this time as we expect to require for the 1935 rate. * * *." (R., pp. 46 and 47.)

Mr. Forbes then inquired of Mr. Granfield whether graphs were being prepared showing the trend and the life of different classes of property and things of that sort, to which Mr. Granfield responded as follows:

> "Yes, sir. For each class of plant we have the history summarized and are preparing brief texts discussing the factors that have been considered, and a summary of the historical data and an outline of the analysis giving the exact calculation of the service life and the salvage that has been realized, and that summary will be the result of summarizing an enormous volume of data. It takes thousands of pages, literally, to assemble these data of property units, and gradually boil them down into summaries that can be checked over in a reasonable time. For instance, we have volumes two or three inches thick giving the history of poles alone in one area, and that was summarized (fol. 65) and concentrated into a form from which the analysis was made, and the computation of the service life, by whatever method is used, will be shown in detail, and charts showing trend in service life and salvage for each class of plant." (R., p. 47.)

He was then asked by Mr. Forbes:

Q. "Do I understand you may change these percentages?"

A. "We are not expecting to, no, sir, but the data on which these percentages are based have not been summarized in a form that makes it convenient to present them and check them over. * * *." (R., p. 47.)

By Commissioner Bollen:

Q. "You didn't expect to have that prepared for this hearing, did you?" (R., p. 47.)

A. "No, sir. We were planning to get that done in time for the August hearing, for both this Commission and the Interstate Commerce Commission."

Q. "You have prepared for this hearing what was required by the Interstate Commerce Commission for this particular property?"

A. "Yes, sir."

"By Commissioner Bollen: It seems to me, Mr. Forbes, you could proceed to inquire into this for the purpose of the 1934 rate, and submit any data you desire to submit in connection with it." (R., p. 48.)

Mr. Forbes, representing the Commission, then offered in evidence the schedules of property and computations of rates of depreciation filed February 28, 1934, by the Northwestern Bell Telephone Company, as above referred to, which were received in evidence as Exhibit 1, and appear on pages 10 to 17 of the printed record (R., p. 48).

The witnesses present for the appellant were then examined by Mr. Forbes on behalf of the Commission, and also by counsel for the Northwestern Bell Telephone Company, appellant. When the examination of these witnesses was concluded, Mr. Schnell, Accountant for the Nebraska State

Railway Commission, was presented as a witness for the Commission (R., p. 187) and laid the foundation for certain exhibits which were introduced. The case was then submitted on the record (R., p. 194).

As bearing on the differences of interpretation placed upon the scope of the hearing by appellant and ourselves, we call attention to the findings of the State Supreme Court in that behalf which are hereinafter set out in this statement.

## DECISION OF THE COMMISSION

On April 9, 1934, there was entered a certain opinion, findings, conclusions and order. The opinion is set out in the record at pp. 17 to 30.

### Opinion

After stating that General Order No. 59 directed all Class A telephone companies to file with the Commission not later than March 1, 1934, a schedule of depreciation rates for the year 1934, setting out the proposed rates for 1934 as contained in the schedules filed by the Commission, and reciting the order of March 6, 1934, the opinion goes on to discuss the evidence adduced before the Commission at the hearing commencing March 19, 1934.

Page 2 of Exhibit 3 submitted by the Commission (R., p. 192) is set out showing the ratio of reserve for accrued depreciation to the plant investment of the company and the average annual percentage rate of the depreciation reserve from January 1, 1921, to December 31, 1932. The ratio of reserve to investment increased from 17.17 per cent January 1, 1921, to 28.23 per cent on December 31, 1926; then decreased to 23.60 per cent December 31, 1931, and

increased to 24.24 per cent in 1932. The annual composite depreciation rate was above 5% from December 31, 1921, to December 31, 1928, being 5.11 per cent at the former date and 5.09 per cent at the later date. It had decreased to 4.67 per cent on December 31, 1932. Reference is made to Exhibit 4 submitted by the Commission (R., p. 195), being an exhibit submitted by the respondent Northwestern Bell Telephone Company in a proceeding before the Commission in the year 1933, which showed an estimated 88 per cent condition of its Nebraska plant investment. The Commission, after examining a number of decisions of courts and commissions, quotes from Docket 14700, Depreciation Charges of Telephone Companies, 177 I. C. C. 351, as follows:

> "The principles are identical which govern the estimating of loss in service capacity for both accounting and valuation purposes. The same elements which produce depreciation for accounting purposes likewise produce depreciation for valuation purposes and they cannot properly be observed and taken into account in the one case and at the same time be overlooked and neglected in the other." (R., p. 25.)

The Commission then says:

> "We do not say that a depreciation reserve of more than 20 per cent of the value of the physical property is sufficient in all cases to take care of accrued depreciation. We do say that a depreciation reserve of 24.24 per cent of the value of physical property is more than sufficient to take care of 12 per cent accrued depreciation or an 88 per cent condition. The gradual reduction of its annual depreciation rates from 5.2 per cent in 1925 to 4.67 per cent in 1932 and a proposed rate of 4.48 per cent for the year 1934, is an admission that its rates have been too high in the past." (R., p. 25.)

The Commission then sets out in a table the amounts expended from 1921 to 1932 for replacements which were represented by debits to the depreciation reserve and for maintenance, the table showing that in the twelve years there was debited to the depreciation reserve $41,000,000.00 plus and there was expended for maintenance $57,000,000.00 plus. The Commission then comments on the fact that more has been spent for maintenance than for replacements and quotes from what was said by the Ohio Commission *In re Ohio Bell Telephone Company*, 2 P. U. R. (N. S.) 113 (R., p. 27). The Commission further comments as follows:

> "An important factor in determining the proper depreciation allowance is the maintenance policy of the company under consideration. This company has from the time of the merger in 1921 carried on a high standard of maintenance and kept its property in good condition and in a high state of efficiency. The line of demarcation between maintenance charge and depreciation charge is often quite dim and undoubtedly many items properly chargeable to reserve are handled as maintenance expense. Charges that would be considered a major requirement to a smaller utility are merely routine maintenance matter to a utility of the size of the present company." (R., p. 26.)

The Commission then says:

> "As compared with the Ohio Company the respondent has during the same years, spent a much larger sum for maintenance. This would indicate either that the respondent has maintained its Nebraska properties in a higher state of efficiency or that on account of deferred maintenance in 1921, it was necessary to spend more to bring respondent's property into a state of efficiency equal to the Ohio Company.

> "In ascertaining the amount required for annual depreciation it is first necessary to determine the service life of the several units of depreciable property. The factors determining service life are decay, wear and tear, physical deterioration, current action of the elements, obsolescence, inadequacy, demands of public authority and such other factors that are not restored by current maintenance. In determining accrued depreciation or percentage condition for ascertaining the fair value for rate making purposes, valuation engineers make inspection of the property to determine observed deterioration and do not give full consideration to the factors which determine the service life of the several units of property. We hold that the same factors should be considered by valuation engineers that are considered by the plant engineers and accountants in determining the required amount of annual depreciation. The differential of the respondent's actual depreciation and its depreciation reserve is probably due to this situation. The instant case presents a situation where it is the duty of the Commission to reduce the annual depreciation rate so it will gradually bring the accrued depreciation and the depreciation reserve into a fair relationship." (R., p 27.)

The Commission then discusses the factor which inadequacy has played in the matter of estimating annual depreciation rates prior to 1934. Statistics are set out which are taken from Exhibit 5, submitted by the Commission (R., p. 197), showing a much slower increase in the growth of population in the decade from 1920 to 1930 than prior to that time.

Exhibit 6, submitted by the Commission (R., p. 200), is also referred to, showing the falling off in the average number of telephones in use, it appearing that on December 31, 1929, there were in use, total stations 123,975, which

had fallen to 102,558 by December 31, 1933. The Commission then states:

> "This would indicate that inadequacy arising from growth will not be an important factor for 1934 and for several years thereafter. It should be out of the picture entirely as far as those exchanges are concerned in cities and towns of less than 3,000 population." (R., p. 28.)

**Findings and Order of the Commission**

The Commission then entered the following findings and conclusions and made the following order:

"We therefore find and conclude:

1. That the respondent's depreciation reserve of 24.24 per cent of its depreciable plant investment is more than is required to take care of actual depreciation of 12 per (fol. 38) cent and that the rate proposed by the respondent of 4.48 per cent for 1934 is excessive.

2. That the factor of inadequacy arising from growth will not be as important a factor in 1934 as it has been in the past and that respondent's proposed rate of 4.48 per cent will not be required for 1934.

3. That the differential now existing between respondent's depreciation reserve and its actual depreciation should be gradually reduced until its depreciation reserve more correctly reflects its actual depreciation.

4. That respondent's proposed depreciation rate of 4.48 per cent should be reduced until its present excess reserve capacity for service has been absorbed.

5. That a depreciation rate of 3½ per cent upon depreciable property including right-of-way be applied by the respondent for the year 1934.

## ORDER

"It is therefore ordered by the Nebraska State Railway Commission that the composite depreciation rate of the Northwestern Bell Telephone Company be and the same is hereby fixed at 3½ per cent upon all of its depreciable property including right-of-way in Nebraska for the year 1934.

"It is further ordered that the Northwestern Bell Telephone Company be and is hereby directed to use a composite rate of 3½ per cent upon all of its depreciable property in Nebraska including right-of-way for the year 1934 for purposes of accounting and reporting to the Nebraska State Railway Commission." (R., pp. 30 and 31.)

### Motion For Rehearing Filed and Overruled

Motion for rehearing was filed by the Telephone Company, April 12, 1934 (R., p. 31), and was overruled by the Commission (R., p. 35), although the wording of the first paragraph of the order was changed slightly so as to read as follows:

"It is therefore ordered by the Nebraska State Railway Commission that the composite depreciation rate of the Northwestern Bell Telephone Company be and the same is hereby fixed at 3½ per cent upon all of its depreciable property in Nebraska including right-of-way, for the year 1934."

## DECISION OF STATE SUPREME COURT

On appeal to the Nebraska Supreme Court, judgment was entered March, 1, 1935 (R., p. 215), and the order of the State Railway Commission affirmed (R., p. 216).

## Opinion of State Supreme Court

In its opinion the Nebraska Supreme Court says:

> "The matter is not here for trial de novo, but for judicial review as to the legality of the order of which appellant complains." (R., p. 218.)

The court further says (R., pp. 217-218):

> "Appellant presents four contentions:
>
> "First. That it was not given full notice of the scope of the hearing and full opportunity to make a defense in the 1934 depreciation rate; that therefore the order was void because it did not afford appellant due process of law under the state and federal Constitutions.
>
> "Second. That, since appellant is engaged in both interstate and intrastate commerce, and the congress has committed the matter of uniform accounting of common carriers of interstate commerce, including telephone companies, to the interstate commerce commission, the state commission was without authority to act on matters of accounting even with respect to intrastate commerce.
>
> "Third. That the order is void because it is not based on evidence sufficient to support it, and is contrary to the evidence.
>
> "Fourth. That the commission erred in denying the motion of appellant to vacate the order and to grant a hearing and a new trial." (R., pp. 217 and 218.)

As to the first contention, the court was of the opinion under the record that the appellant was afforded full notice of the scope of the proceeding and of the purpose of the Commission to fix the 1934 depreciation rate; that it had an opportunity to, and was permitted to introduce all

the evidence which it desired; that no objection was made on these grounds until after the decision, and concluded generally:

> "We think appellant had timely notice of the scope of the hearing, appeared generally, and was afforded due process of law in the matter." (R., p. 219.)

As to the second point, the Supreme Court came to the conclusion that inasmuch as the Interstate Commerce Commission (which than had accounting jurisdiction over common carrier telephone companies engaged in interstate business) had not acted under the authority bestowed upon it by Congress to prescribe annual depreciation charges, jurisdiction still subsisted in the Nebraska State Railway Commission to prescribe such rate (R., pp. 219-221). The court found the evidence sufficient to support the order, and found no reversible error (R., p. 221).

## POINTS RELIED UPON BY THE APPELLANT UPON ITS APPEAL HEREIN

The appellant has filed herein a statement of points relied upon pursuant to rule 13 (R., p. 229) from which it appears that it complains:

### I.

**That it did not have notice of the scope of the hearing which was intended to be had for the purpose of fixing the 1934 depreciation rate, nor opportunity for presenting evidence in support thereof, and, hence, was not afforded due process of law.**

II.

That the Nebraska State Railway Commission was without jurisdiction to prescribe the 1934 depreciation rate applicable to appellant's property, for that:

(a) The matter of the fixing of such rates was at all times controlled by the regulations of the Interstate Commerce Commission; and

(b) Because the order made by the Nebraska State Railway Commission was in conflict with the regulations and orders of the Interstate Commerce Commission, then in force prescribing the rules, principles and methods pursuant to which appellant was required to account for the expenses of depreciation.

III.

That the order of the Nebraska State Railway Commission was void for that it deprived appellant of property rights without due process of law and denied to appellant protection of the laws, in that:

(a) It deprived the appellant of the right to maintain true and accurate accounts recording the expenses of its business;

(b) It purports to require the use for accounting by appellant of a rate of depreciation which was intended to be, and in fact was, less than the true rate, in order to reduce the balance of appellant's depreciation reserve account.

The points relied upon by appellee will be found in the summary of argument which follows immediately at this point.

## SUMMARY OF ARGUMENT

**Point 1.** The appellant was, in fact, as disclosed by the record, afforded full and sufficient notice of the scope of the hearing which was intended to be had before the State Commission for the purpose of fixing its 1934 depreciation rates, and was afforded full opportunity to present evidence and argument.

Hence, the proceedings before the State Commission were in themselves fully sufficient to afford due process of law.

**Point 2.** However, since the order of the State Commission, here complained of, is a legislative act, being in fact a state statute, due process would not require notice and hearing before its entry, but is satisfied by the fact that the order may be tested judicially to determine its lawfulness after notice and hearing in the state courts.

**Point 3.** Again, the order of the State Commission was merely an accounting order and did not affect the appellant in his property rights; under such circumstances, the question of due process does not arise.

**Point 4.** The Nebraska State Railway Commission had jurisdiction to fix the rates of depreciation to be employed by appellant as to its Nebraska property used in intrastate operations, and its jurisdiction was not affected either (1) by the provisions of Section 20 of the Interstate Commerce Act, bestowing on the Interstate Commerce Commission jurisdiction over uniform accounting of telephone companies engaged in interstate commerce; or (2) by the provisions added to said section by the Transportation Act of 1920 authorizing the Interstate Commerce Com-

mission to prescribe depreciation charges for such telephone companies, since the Interstate Commerce Commission had not assumed to fix depreciation charges under said section to be applicable in the year 1934.

**Point 5.** The order made by the Nebraska State Railway Commission was not in conflict with the regulations and orders of the Interstate Commerce Commission then in force prescribing the rules, principles and methods pursuant to which appellant was required to account for expenses of depreciation.

**Point 6.** The order is not obnoxious to the constitutional provision guaranteeing appellant due process of law either (1) on the ground that it requires the making of incorrect accounting entries, or (2) because it is not based upon any evidence in the record.

## ARGUMENT

### Point 1

**The appellant was, in fact, as disclosed by the record, afforded full and sufficient notice of the scope of the hearing which was intended to be had before the State Commission for the purpose of fixing its 1934 depreciation rates, and was afforded full opportunity to present evidence and argument. Hence, the proceedings before the State Commission were in themselves fully sufficient to afford due process of law.**

### A. Full and Sufficient Notice Afforded

The appellant complains that it did not have notice of the scope of the hearing which was intended to be had for the purpose of fixing the 1934 depreciation rate, nor oppor-

tunity for presenting evidence and argument in support thereof, and, hence, was not afforded due process of law. It is for this reason that we have been at pains to set out in detail in the statement of the case herein a full account of the proceedings which were had and taken by the Commission which led up to and culminated in the legislative order fixing the depreciation rate for 1934 which is drawn in controversy on this appeal.

For the purpose of the discussion of this point, we assume, without conceding, that it is necessary that notice and hearing be afforded before legislative action may be taken by the Commission.

As pointed out in the statement above, the State Commission had plenary jurisdiction to regulate the rates, service and general control of the intrastate operations of the appellant telephone company.

In pursuance of this general power of regulation, it proceeded to, and did, enter a regulatory order fixing the rate of depreciation for the year 1934 on the property of the Northwestern Bell Telephone Company employed in intrastate operations.

The jurisdiction of the Commission to enter such an order is confirmed by the holding of the State Supreme Court as reflected in the second paragraph of the syllabus in the instant case:

> "Until the interstate commerce commission fixes the rates of depreciation upon local class A telephone company property for intrastate purposes, the state railway commission has jurisdiction and authority to prescribe such rates." (R., p. 216.)

Adverse counsel appear to have become confused by the fact that two subject-matters are discussed in General Order No. 59 (R., pp. 2 to 10, inclusive).

One subject dealt with in that order was the matter of estimates of depreciation rates and supporting data to be filed August 1, 1934, for the purpose of complying with the directions of the Interstate Commerce Commission in its order in Docket 14700 (Depreciation Charges for Telephone Companies, 177 I. C. C. 351) and supplements, and was designed to provide a basis for establishing depreciation rates for Class A telephone companies after January 1, 1935.

Another and entirely separate subject for action was the establishment of depreciation rates for the year 1934.

This matter is fully discussed in our statement of the case.

The appellant telephone company, on February 28, 1934, filed separate schedules of the property included in its depreciable plant accounts as of January 1, 1934, with estimates of service lives and salvage values and depreciation percentages proposed for use during the year 1934 (R., pp. 10-13).

On March 6, 1934, the Commission entered a further order in which it recites the filing of the schedules of depreciation rates for 1934 and states further:

> "The same having been examined by our engineering staff and not being fully satisfied with the rates proposed, we find that the cause should be set down for hearing for oral examination of the members of respondent's staff, who prepared said schedules, and

> for the introduction of such evidence the Commission may desire to submit with opportunity of objections and cross-examination by respondent." (R., p. 18.)

And it was further ordered the cause be set down for hearing on the 19th day of March, 1934 (R., p. 18).

On March 19th, date set for the hearing, the Northwestern Bell Telephone Company appeared by its attorneys; that the nature and scope of the hearing was clearly defined at the very inception thereof is disclosed by the statement which we have heretofore made.

The presiding Commissioner stated at least twice (R., pp. 46, 47 and 48) that the purpose of the hearing was to fix the 1934 rate. When Mr. Forbes, Chief Engineer for the Commission, suggested there should be a complete showing at one time, and that he understood that the company had supporting data which was being prepared to be filed August 1, 1934, the presiding Commissioner said to Mr. Forbes that his position would be good if this was August 1st instead of March 1st. He then stated:

> "This is simply for the fixing, of course, of the 1934 rate, and the Interstate Commerce Commission and we did not require as full a showing at this time as we expect to require for the 1935 rate." (R., pp. 46-47.)

And again it was stated by the presiding Commissioner:

> "It seems to me, Mr. Forbes, you could proceed to inquire into this for the purpose of the 1934 rate, and submit any data you desire to submit in connection with it." (R., p. 48.)

**B. Specific Objections of Appellant As to Notice Considered.**

Consideration is given at this point to the specific objections raised by appellant in its brief on the question of notice.

**(1) Appellant's contention that there was no notice in this proceeding that the Commission had in contemplation the making of any order affecting the accounting in 1934 by appellant for the expense of depreciation.**

Discussing the order of March 6, 1934, setting the cause down for hearing on March 19th (R., pp. 17 and 18), appellant says in his brief (p. 19):

> "The preceding course of this matter before the Commission had given it a well defined character as one looking toward the making of recommendations by the Commission to the Interstate Commerce Commission."

Appellant refuses to recognize the clear import of the order of the Commission entered November 29, 1933 (R., pp. 2 to 10), which, as we have heretofore pointed out, had to do with two separate subject-matters,—the first being the matter of co-operation with the Interstate Commerce Commission in fixing depreciation rates to be effective after January 1, 1935, and as to which data was to be filed on or before August 1, 1934, with the Commission;—the second, the matter of fixing the 1934 depreciation rates.

Appellant further says as to the order of March 6, 1934, which it terms a "notice":

> "There is nothing in this notice which suggested any controversy between any persons whatever, or any

issue to be tried or determined. * * * This surely falls far short of suggesting any issue which was to be resolved by the making of an order by the Commission." (Appellant's Brief, p. 19.)

The order of March 6, 1934 (R., pp. 17 and 13) recites that the schedules and data filed by the appellant telephone company have been examined by the Commission's engineering staff and that the Commission not being fully satisfied with the rates proposed find that the cause should be set down for hearing for oral examination of the members of the respondent staff who prepared such schedules, and for the introduction of such evidence as the Commission may desire to submit with opportunity of objections and cross-examination by respondent.

Notice was surely afforded:

(1) That the Commission was *not satisfied* with the schedules of depreciation rates submitted;

(2) That it desired to examine the members of the appellant's staff who computed them and were responsible for them,—in other words, the material witnesses who would be in a position to testify as to the accuracy or inaccuracy of these rates;

(3) That it proposed to introduce testimony *on its own behalf* with an opportunity to the appellant to object to the evidence presented by the Commission and to cross-examine its witnesses.

It would seem that the order itself would be sufficient to admonish one of ordinary intelligence that the schedules of depreciation rates filed with the Commission for application in 1934 were not going to be accepted by the Commis-

sion at their face value; that it intended to test their accuracy and to submit evidence of its own on the same subject-matter.

Coupled with this, of course, is the fact that at the hearing it was distinctly announced by the presiding commissioner that the purpose of the hearing was to fix the 1934 depreciation rate (R., pp. 46, 47 and 48).

It is suggested in appellant's brief that it was not the intention of the Interstate Commerce Commission in requesting information as to the 1934 rates to be filed with it as of March 1, 1934, to *satisfy* anyone in the sense of making out a case for the approval of its schedule of depreciation rates by public authority (Appellant's brief, p. 19).

Appellant here again confuses the issue. The order of the Nebraska State Railway Commission for data to be filed with it March 1, 1934, similar to that requested by the Interstate Commerce Commission was not in any way connected with the proceedings which were going forward before the Interstate Commerce Commission for the purpose of fixing depreciation rates to be effective after January 1, 1935, and in which the State Commission and the Interstate Commerce Commission were co-operating. It was for the distinct purpose of fixing depreciation rates for 1934 upon appellant's Nebraska property employed in intrastate operations. This distinction was made clear at the inception of the hearing by the statements made by Mr. Forbes, for the Commission, Mr. Peycke, for the appellant, and by the presiding Commissioner, Mr. Bollen (R., pp. 46, 47 and 48), which statements we have heretofore set out in detail in our statement of the case.

**(2) Appellant's contention that the order of November 29, 1933, of the Nebraska Commission giving notice of the proceeding and the whole course of the proceedings in the matter then before it were inconsistent with the making of the order appealed from.**

We think we have sufficiently demonstrated the dual character of the subject-matter contained in the order: That it referred not only to the fixing of depreciation rates in cooperation with the Interstate Commerce Commission, to be effective in 1935, but that it also had for its purpose the fixing of depreciation rates to be applied upon appellant's Nebraska property used in intrastate operations for the year 1934.

**(3) Appellant's contention that the purpose of the proceeding had been disclosed to be that of securing information for the purpose of making recommendations to the Interstate Commerce Commission, and no other purpose had been suggested.**

What we have said under the preceding subdivisions applies *a fortiori* here.

It is true that the Nebraska State Railway Commission expressed its intention to cooperate in the proceedings which were being had before the Interstate Commerce Commission to fix the 1935 rates (R., p. 8), but it is not true that there was no other purpose expressed by the State Commission. It plainly expressed its purpose to establish the depreciation rates of the appellant for 1934, both in its order of November 29, 1933, and at the hearing on March 19, 1934.

**(4) Appellant's contention that the Nebraska Commission adopted the principles and procedure which the Interstate Commerce Commission had laid down.**

This is true as to the matter of cooperation in fixing depreciation rates for 1935. The fact, however, has no pertinency so far as the determination of depreciation charges for 1934 are concerned. Appellant fails to point out any procedure laid down by the Interstate Commerce Commission with respect to the 1934 rates. Depreciation Circular No. 7 did not prescribe any procedure beyond the filing of the rates for the information of the Commission. Appellant contends (Brief, p. 5), and it may be correct, that the circular did not even require filing with the State Commission. If no procedure was provided, how could it be adopted?

**(5) Appellant's contention that the order is inconsistent with the principles and requirements of the Interstate Commerce Commission and is therefore inconsistent with the principles which the commission had in this very proceeding formally announced that it embraced and adopted.**

Whether the Commission's order is in conflict with any applicable regulations of the Interstate Commerce Commission is discussed in a later section of this brief. See Point 5.

**(6) Appellant's contention that the Nebraska Commission had clearly announced its intention to make no order having to do with any question as to jurisdiction as between state and federal authority until after the fixing**

of rates of depreciation by the Interstate Commerce Commission had been fully accomplished.

It is true that the Commission in its order did consider the possible conflict in jurisdiction between the federal commission and the state commission, but decided their spheres were not necessarily in conflict. It announced its purpose to cooperate with the Interstate Commerce Commission in the proceedings pending to establish depreciation charges for 1935; approved the procedure adopted by the Interstate Commerce Commission looking to that end, but as to the fixing of depreciation charges to be applied intrastate in Nebraska, reserved the right to review the same. This, however, as we have repeatedly pointed out, had no connection with and was a separate subject from the matter of depreciation rates for 1934, concerning which there was no proceeding pending before the Interstate Commerce Commission.

**C. Full Opportunity Afforded to Present Evidence and Argument.**

Appellant (Brief, p. 27) quotes what was said by this court in *The New England Divisions Case*, 261 U. S. 184, at p. 200:

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

It is urged by appellant that it was not afforded an opportunity to address itself by evidence and argument to the issue which was to be resolved by the decision of the

Nebraska State Railway Commission. The contention of appellant seems to be based upon the supposed insufficiency of the notice which it received as to the scope of the hearing,—that is, the issue which was to be dealt with thereat. We think we have sufficiently demonstrated hereinbefore that the notice of the scope of the hearing was entirely adequate. If the appellant did not have a full hearing, it was not by reason of the lack of opportunity so to do. Its witnesses were present. Its counsel was present. It participated in the hearing through its counsel, who questioned not only the witnesses who represented the appellant company but the witness adduced by the Commission. No question as to notice or hearing was raised until motion for rehearing was filed (R., p. 31). At the time the motion for rehearing was argued and submitted, the appellant telephone company asked leave to and was permitted to file Exhibit 7, being the First Revised Issue of the Uniform System of Telephone Accounts issued by the Interstate Commerce Commission (R., p. 41).

The motion for rehearing (R., p. 31) while it complains that the order of the Commission was made without affording respondent an opportunity to be heard, does not specify any further or additional evidence which was available to it or which it might have produced at the hearing.

It is not shown that appellant's counsel expressed any desire for argument except on the motion for rehearing where they were fully heard (R., p. 33), but it certainly does not appear that they were ever denied argument.

Further, as pointed out by the State Supreme Court, there was no attempt made by the appellant telephone company, although it knew, or should have known, that

the Commission was about to fix its 1934 depreciation rate, to introduce any other or further evidence, but the cause was submitted on the record at the conclusion of the examination of the witnesses produced by the company, and the Commission's own witness (R., p. 194).

The State Supreme Court disposed of the matter of notice and hearing, as follows:

> "As to the claim that appellant had no sufficient notice of the scope of the hearing, the record shows that it appeared and for two days participated in the hearings and furnished its schedules showing the rates of depreciation on various kinds of property owned and used by it. * * * But when the record shows that all the evidence was taken that either party desired to offer and that the cause was submitted on the record without objections of any sort until after the decision, we think we ought not, in such a case, to reverse the action on the ground that, after the judgment was entered against a party, it can then claim it was taken by surprise as to the (fol. 306) scope of the action. Indeed, even after the final order was entered, on the hearing of the motion for new trial, the parties stipulated (and it appears in the bill of exceptions) on May 15, 1934, for the admission of additional evidence. This was incorporated in the bill of exceptions in the form of a book of 101 pages on Uniform System of Accounts for Telephone Companies, issued by the interstate commerce commission in 1933. Until the motion for rehearing was filed, setting up the points now relied on, the record does not show that the commission as a court had any notice that appellant was aggrieved by the procedure. The evidence shows that counsel for the telephone company at the outset of the hearing suggested names of parties having to do with the calculation of the rate. Most of these were examined at length in a hearing apparently conducted with all the formality of any court. It

appears all through the evidence that what the commission and telephone company were seeking was the proper evidence upon which to base a proper rate of depreciation to be used by the commission in 1934 only. If the telephone company had offered or proposed to offer other or further evidence and had been refused the opportunity, it would have presented a different question than that now before us. We think appellant had timely notice of the scope of the hearing, appeared generally, and was afforded due process of law in the matter." (R., pp. 218-219.)

Full notice and opportunity for hearing were afforded appellant in the proceedings before the Commission.

**Point 2**

**However, since the order of the State Commission, here complained of, is a legislative act, being in fact a state statute, due process would not require notice and hearing before its entry, but is satisfied by the fact that the order may be tested judicially to determine its lawfulness after notice and hearing in the state courts.**

**(a) The order complained of is a legislative act.**

It is stated in plaintiff's petition for appeal (R., p. 223):

"2. * * * The statute of the State of Nebraska, the validity of which was so drawn in question, was the said order of the Nebraska State Railway Commission, made and entered April 9, 1934. The decision and judgment of said Supreme Court was in favor of the validity of said order and statute of the State of Nebraska. The errors of which petitioner complains appear from the assignments of error presented and filed with this petition."

> "3. Petitioner further shows that for the reasons aforesaid this case is one in which under the legislation in force when the act of January 31, 1928 (45 Stat. L. 54) was passed, to-wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A, Sec. 344) a review could be had in the Supreme Court of the United States on writ of error."

The applicable portion of Section 237 of the Judicial Code as amended (28 U. S. C. A., Section 344 (a)) is as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * or where is drawn, in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity may be reviewed by the supreme court upon a writ of error * * *."

The Act of January 31, 1928 (45 Stat. L. 54) was effective merely in changing the procedure from writ of error to appeal.

If the said order is a statute of the State of Nebraska within the meaning of Section 237 of the Judicial Code, an appeal would lie to this court. *King Mfg. Co.* v. *City Council, Augusta,* 277 U. S. 100; *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries of the State of Washington,* 277 U. S. 135; *Hamilton* v. *Regents of the University of California,* No. 55, October Term, 1934, L. Ed. Adv. Ops., Vol. 79, p. 159.

This court has noted probable jurisdiction on this appeal, indicating its tentative acceptance of this theory.

If this theory is correct and the order is, in fact, a legislative act, the order in question should be judged, as to due process, by such criteria as are ordinarily applied in case of legislative enactments.

**(b) Legislative acts do not require notice to interested parties nor hearing on their behalf before action is taken. It is sufficient if an opportunity be afforded for review in the courts of the state, on sufficient notice and hearing, for the purpose of testing the lawfulness of the legislative act after its enactment.**

The doctrine of due process of law had its original in the 39th Chapter of Magna Carta, which in its fullest and most complete sense is taken by most commentators to include a prohibition against the taking of property except by the law of the land.

While the fundamental idea underlying this guarantee has subsisted from the earliest days of the common law, still the requirements to be exacted in order that the guarantee might be preserved have undergone distinct development and changes. For example, in the earlier stages of the law the inquiry as to due process was directed largely to the right of jury trial. Later the requirement of notice and hearing was developed and it is with this later doctrine that we have here to do. *Mott on Due Process of Law* (pp. 208 and following).

A reference to the work of Professor Mott, above referred to, discloses the fact that the courts have found the criterion of notice and hearing too strict for universal application. It has, therefore, been cut down to the minimum with respect to determinations of administrative tri-

bunals, only such notice and hearing being required as the nature of the proceeding renders it possible to afford without loss of adequacy and efficiency. With regard to legislative acts, we have not been able to discern any inclination on the part of the courts to require notice or hearing *before* the act is passed. *After* the act is passed, the question of its lawfulness is, of course, a judicial question and as to this question there must be provided the means for a judicial determination after notice and hearing.

It will be noted that there is a distinction between the *action* of the legislature which does not require notice or hearing, and the determination of the *reasonableness or lawfulness* of its action, which is a judicial question and must, therefore, be open for determination in the courts.

Applying the distinction to the order of the Commission here in question, we are satisfied that it was not necessary that the appellant be afforded notice and hearing of the action taken by the Commission in the entry of the order. Of this it cannot complain. It is sufficient, if it was afforded the opportunity for a judicial determination as to the reasonableness of the Commission's order in the courts of the state. This affords due process, such as is ordinarily and customarily accorded with relation to legislative enactments.

The principles which we have above set out are exemplified in the case of *Wadley Southern Railway Co.* v. *State of Georgia*, 235 U. S. 651. In that case there was drawn in question an order of the State Railway Commission directing a carrier by rail to desist from discrimination practiced by denying shippers the right of interchange of freight via a certain junction point. On failure of the carrier to

comply, a suit to enforce a penalty was brought in the Georgia courts and the carrier there pleaded that the order of the Commission, and the statute on which it was based, took property without due process of law, in violation of the provisions of the 14th Amendment. The case was, of course, decided with regard to the nature and character of the penalty imposed for violation of the order, and whether it was so excessive in amount that the liability to have it imposed affected the carrier's right to test the validity of the Commission's order in the court. It was necessary, however, to examine the nature of the order made by the Commission and to discuss its effect, and in so doing the court said:

> "This contention would have been well founded if this and other hearings of a like nature before the commission had resulted in orders which had the characteristics of a final judgment. But this was not so, for they were not conclusive. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. Their lawfulness was treated by the Georgia court in the present case as open to inquiry, when the company was sued for a penalty. The question of their validity was also open to inquiry, in equity proceedings, in the state court, where they would have been set aside if found to be arbitrary and unreasonable, or to have violated some statutory or constitutional right. *Railroad Commission* v. *Louisville & N. R. Co.*, 140 Ga. 817 (6a), 836, L. R. A. 1915E, 902, 80 S. E. 327; *State* v. *Western & A. R. Co.*, 138 Ga. 835, 76 S. E. 577; *Southern R. Co.* v. *Atlantic Sand & Supply Co.*, 135 Ga. 50, 68 S. E. 807. Such orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property. *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 313, 58 L. ed. 242, 34 Sup. Ct. Rep. 48, and cases cited. And this right to a judicial determination

exists whether the deprivation is by a rate statute—passed without a hearing (as in the Young and Consolidated Gas Cases); or by administrative orders of a commission, made after a hearing (as in the Garrett Case, supra). For rates made by the general assembly, or administrative orders made by a commission, are both legislative in their nature (Garrett Case, supra; *Grand Trunk Western R. Co.* v. *Railroad Commission*, 221 U. S. 403, 55 L. ed. 787, 31 Sup. Ct. Rep. 537), and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 458, L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 174, 44 L. ed. 420, 20 Sup. Ct. Rep. 336; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; *Missouri P. R. Co.* v. *Nebraska*, 217 U. S. 207, 54 L. ed. 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; *San Joaquin & K. R. Canal & Irrig. Co.* v. *Stanislaus County*, 233 U. S. 459, 58 L. ed. 1046, 34 Sup. Ct. Rep. 652; *Bacon* v. *Rutland R. Co.*, 232 U. S. 134, 58 L. ed. 538, 34 Sup. Ct. Rep. 283; *Detroit & M. R. Co.* v. *Michigan R. Commission*, 235 U. S. 402, ante, 288, 35 Sup. Ct. Rep. 126.

"The methods by which this right to a judicial review are secured vary in different jurisdictions. In some states there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the commission. *Washington ex rel. Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; *State ex rel. Railroad Commission* v. *Oregon R. & Nav. Co.*, 68 Wash. 160, 167, 123 Pac. 3; *Seward* v. *Denver & R. G. R. Co.*, 17 N. M. 557, 46 L. R. A. (N. S.) 242, 131 Pac. 980. Cf. *Oregon R. & Nav. Co.* v. *Campbell*, 173

Fed. 957, 989. In others, by proceedings in equity. In the Federal Courts the method of procedure, when administrative orders are attacked as unconstitutional, is now regulated by section 266 of the Judicial Code (36 Stat. at L. 1162, chap. 231), as amended (37 Stat. at L. 1014, chap. 160; Comp. Stat. 1913, sec. 1243)."

*Wadley S. R. Co.* v. *Georgia*, 235 U. S. 405, 411, 59 L. Ed. 660.

In the case of *C. B. & Q. R. R. Co.* v. *State of Nebraska*, 170 U. S. 57, the court had to do with an ordinance of the City of Omaha which provided for the repair of a viaduct over certain railroad tracks and apportioned the expense between railroad companies without notice to them. Action was brought, on the relation of the City of Omaha, for mandamus, requiring one of the railroads concerned to comply with the ordinance and repair the viaduct. It was contended that the ordinance did not afford due process to the company for the reason that no notice or hearing was afforded before the taking of its property. This court, however, upheld the action of the State Supreme Court in affirming a judgment of the State court of first instance in awarding mandamus, saying:

"So, in the present case, while no notice may have been given to the railroad companies of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them respectively for the repair of the viaduct in question.

"The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the state, it is not the function of this court, apart

> from the provisions of the Federal Constitution supposed to be involved, to declare state enactments void, because they seem doubtful in policy and may inflict hardships in particular instances."

In the case of *Vandalia R. R. Co.* v. *Public Service Commission of Indiana*, 242 U. S. 276, the court had to do with a statute of the state of Indiana conferring upon the Railway Commission authority to investigate the condition and efficiency of headlights in use on locomotive engines on railroads in the state, and, after determining the most practicable and efficient headlight, to make and enforce the necessary orders for the installation thereof. Pursuant to this authority, an investigation was conducted, the result of which was an order requiring the use of headlights of a certain determined candle power. The plaintiff in error, a railroad affected by the order, brought an action in the state court to enjoin the enforcement of the order, on the ground that, among other things, it was repugnant to the due process clause of the 14th Amendment.

It was recognized that the State Supreme Court had so construed the statute in question as to be supplementary to other legislation which gave to any carrier or other party dissatisfied with any order of the Commission the right to resort to the courts in an action to suspend it or set it aside. Since, however, this court found that there had been a notice and full hearing before the Commission, this question was not controlling. Nevertheless the conclusion of the court was based on both propositions,—namely: that notice and hearing had been afforded before the Commission and that the railroad had been afforded and had exercised the

right to a judicial review in the courts of the state, the court saying:

> "Since the order in question was made after notice and a full hearing, and plaintiff in error had and exercised the right to a judicial review by action at law, we concur in the view of the state court that there has been in this respect no deprivation of property without due process of law." (P. 286.)

Of course, where the order of the Commission is final and the law of the State does not afford a judicial review, and no notice or hearing has been had prior to the order made by the Commission, an entirely different situation is presented. In such case this court has held that due process of law is not afforded, as in *C. M. & St. P. R. R. Co.* v. *State of Minnesota,* 134 U. S. 418.

We are satisfied, however, that the requirements of due process are fully met under the laws of the State of Nebraska, and that due process would be afforded even though the order in question had not been preceded by notice and a full hearing.

**(c) The order of the Nebraska State Railway Commission was subject to a judicial review for lawfulness in the courts of the State of Nebraska.**

**(1) Remedy by Appeal**

The statutes of the State of Nebraska (Section 70-505, Compiled Statutes, 1929) provide for an appeal to the Supreme Court of Nebraska on the part of anyone dissatisfied with an order of the Nebraska State Railway Commission.

The scope of such appeal is indicated by the statement of the State Supreme Court in its opinion in the instant case (R., p. 218):

> "The matter is not here for trial de novo but for judicial review as to the legality of the order of which appellant complains."

Under the statute above quoted, if the State Supreme Court found that the commission's order of which the appellant complains was so unreasonable as to be confiscatory, or to deny equal protection of the law, it had full power to reverse the order and set it aside.

### (2) Remedy by Injunction

Appellant urges, however, that this remedy by appeal would not be sufficient to afford due process of law since the cause would be heard on the same record as was made before the State Commission.

It is urged that if the appellant was denied notice and hearing before the Commission, the record would not reflect all the evidence which it might be able to produce to establish the unreasonableness or unlawfulness of the order. Assuming, but not conceding, that there has been shown to be any evidence available to appellant which was not in substance adduced before the Commission at the hearing which was had on March 6, 1934, still we think this objection would be obviated by the fact that the appellant had the right to apply either to the state courts or to the federal courts for an injunction against the enforcement of the order, if in fact it was so unreasonable as to be confiscatory or to deny equal protection of the laws.

Since the remedy by appeal affords a remedy which is ordinarily adequate and complete, it would not in the nature of things ordinarily happen that a party appearing before the Commission would resort to the equity courts to enjoin an order of the Commission even though it was deemed to be utterly void. The injunction suit would be brought in a court of first instance, inferior to the State Supreme Court, and subject to review in that court, and, hence, the remedy by injunction would be more cumbersome in that an additional hearing would be required, and more delay and expense would be incurred, than if a direct appeal were taken to the State Supreme Court. It so happens that to our knowledge no such suit has been so instituted in the District Courts of the state and taken on appeal to the Supreme Court of the state, hence, we are not able to cite any decisions of our Supreme Court in which the right to enjoin the enforcement of an unconstitutional order of the Commission has been upheld in express terms.

However, the State Supreme Court has held that an unconstitutional law is as though it had never been. *Boales* v. *Ferguson,* 55 Neb. 565; *Finders* v. *Bodle,* 58 Neb. 57; *State* v. *Several Parcels of Land,* 78 Neb. 703; *Anderson* v. *Lehmkuhl,* 119 Neb. 451. In fact, the court has said in regard to such a law:

> "It was fatally smitten by the Constitution at its birth."
>
> *Boales* v. *Ferguson*, 55 Neb. 568.

Under such circumstances, should it be attempted to enforce an unconstitutional legislative order of the Commission, and the property rights of a party were affected thereby so as to submit his property to confiscation, and to cause him irreparable injury, we make no doubt that our

Supreme Court would hold that an injunction would lie to prevent the enforcement of such order. This is the general rule, 32 C. J. 243.

Indeed, this is indicated by what was said by the State Supreme Court in the instant case with reference to the order here complained of, fixing rates of depreciation:

> "It was for 1934 only and steps had already been taken to fix the rate for 1935. If the rate should prove to be confiscatory, if and when applied, it is quite likely the appellant will be able to discover a remedy." (R., p. 221.)

We cannot place any other construction upon this statement than that the State Supreme Court was of the opinion that if the rate of depreciation prescribed for application in 1934 should prove to be confiscatory in light of the future experience of the company, and when given application in a rate case, the appellant telephone company might in such instance invoke the power of equity to enjoin its application.

It so happens, however, that in the federal jurisdiction, there have been reported cases, arising in this state, where resort has been had to equity in order to enjoin orders of the Commission which were complained of as confiscatory or otherwise violative of complainant's constitutional guaranties.

In fact the appellant, in this case, the Northwestern Bell Telephone Company, sought and obtained a permanent order of injunction against the State Commission in the federal district court of Nebraska to prevent the enforcement of certain intrastate telephone exchange rates on the

ground of confiscation. *Northwestern Bell Telephone Company* v. *Nebraska State Railway Commission* (1925), 6 Fed. (2d) 663.

See also:

*Mo. Pac. Ry. Corp.* v. *Nebraska State Ry. Com.*, 65 Fed. (2d) 557.

We are satisfied that this remedy is open under proper circumstances, in either the State or the Federal courts of Nebraska.

**Point 3**

**Again, the order of the State Commission was merely an accounting order and did not affect the appellant in its property rights; under such circumstances, the question of due process of law under the 14th Amendment to the federal constitution does not arise.**

The constitutional guaranty of due process of law is for the protection of life, liberty and property. If none of these objects of protection are involved, the constitutional guaranty may not be invoked. The order complained of, as amended on the hearing on the motion for rehearing, is as follows:

> "It is therefore ordered by the Nebraska State Railway Commission that the composite depreciation rate of the Northwestern Bell Telephone Company be, and the same is, hereby fixed at 3½ per cent upon all of its depreciable property in Nebraska including right-of-way for the year 1934." (R., p. 35.)
>
> "It is further ordered that the Northwestern Bell Telephone Company be, and is, hereby directed to use a

composite rate of 3½ per cent upon all of its depreciable property in Nebraska including right-of-way, for the year 1934, for purposes of accounting and reporting to the Nebraska State Railway Commission." (R. p. 31.)

It will be noted that the rate of depreciation is directed to be used for *purposes of accounting and reporting to the Nebraska State Railway Commission.*

It is a matter of common knowledge that the Northwestern Bell Telephone Company is an operating company united with other like organizations under the general control of the American Telephone and Telegraph Company and commonly known as the "Bell System." This court had recently before it, in the cases of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133, and *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151, the matter of annual depreciation charges made by the Illinois Bell Telephone Company, another member of the Bell system. We may say that the system of depreciation valuation and accounting, described by this court in the *Lindheimer* case, is identically the same as is used by the Northwestern Bell Telephone Company and testified to by their witnesses in the instant hearing.

Mr. Justice Hughes, in delivering the majority opinion in the *Lindheimer* case, stated (p. 167):

> "Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is,

in the cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered. The amount necessary to be provided annually for this purpose is the subject of estimate and computation. In this instance, the Company has used the 'straight line' method of computation, a method approved by the Interstate Commerce Commission. 177 Inters. Com. Rep., pp. 408, 413. By this method the annual depreciation charge is obtained by dividing the estimated service value by the number of years' of estimated service life. The method is designed to spread evenly over the service life of the property the loss which is realized when the property is ultimately retired from service. According to the principle of this accounting practice, the loss is computed upon the actual cost of the property as entered upon the books, less the expected salvage, and the amount charged each year is one year's pro rata share of the total amount. Because of the many different classes of plant, some with long and some with short lives, some having large salvage and others little salvage or no salvage, and because of the large number of units of a class, the Company employs averages, that is, average service life, average salvage of poles, of telephones, etc.

"While property remains in the plant, the estimated depreciation rate is applied to the book cost and the resulting amounts are charged currently as expenses of operation. The same amounts are credited to the account for depreciation reserve, the 'Reserve for Accrued Depreciation.' When property is retired, its cost is taken out of the capital accounts, and its cost, less salvage, is taken out of the depreciation reserve account. According to the practice of the Company, the depreciation reserve is not held as a separate fund but is invested in plant and equipment."

Mr. Granfield, the Inventory and Costs Engineer of the appellant telephone company, makes substantially the same

statement in his evidence as to the general nature of depreciation and the method of computation. Since we have no idea that this statement will be controverted, it is perhaps unnecessary to make reference to the record, since many observations are scattered through the entire record of the testimony which bear in some way upon this question. However, the testimony of Mr. Granfield, together with that of Mr. Baird (who was injected from time to time to answer accounting questions during the course of the examination of Mr. Granfield) was devoted generally to the explanation of the nature and necessity of establishing a reserve for depreciation, and the method and form which was employed by the company for expressing the same upon their books in what is termed "Depreciation Accounting," as appears on pages 48 to 89 of the record.

The point to which we desire to call attention at the present time, however, is the point to which Mr. Justice Hughes calls attention, and that is that, according to the practice of the company, the depreciation reserve is not held as a separate fund but is invested in plant and equipment. Mr. Granfield, examined on this point, stated (R., p. 83):

> Q. "Can your accountant tell us the per cent of your depreciation reserve that is actually invested in plant?"
>
> A. "I think the accounting people can tell how much that is."
>
> Q. "When you invest it in plant, you add that to the plant investment?"
>
> A. "Yes, sir, all of our plant investment."
>
> Q. "Upon which you claim a fair return?"
>
> A. "Yes, sir."

(Fol. 129.) Q. "Would you be able to answer that question for the record, and make our story continuous here?"

"By Mr. Baird:

A. "The question is what per cent of the reserve is now invested in plant?"

Q. "Yes."

A. "We didn't indicate on the assets side as to whether it is reserve or not. Looking at the balance sheet, however, you will find that it must be mostly in the plant, because there are no such sums in the other assets. There is no way to tag it. We didn't tag it."

Q. "Could you state from examining, or refreshing your memory, about what per cent of your present reserve is invested in plant?"

A. "I have no way of knowing, except that there are no items in the assets side that anywheres near approximate the amount of the depreciation reserve, except one item of investments and securities. We have thirty-two million in reserve, and our assets of a hundred and forty-eight million. There is a hundred and thirty million in plant. The only large items other than plant is the investments and securities and advances of twelve million nine hundred thousand, and twenty-five hundred thousand in receivables, but how much is in one and how much in the other. I would have no way of knowing." (R., p. 83.)

There are methods of depreciation accounting which actually provide a sinking fund which has a distinct existence apart from the capital accounts and surplus account of the utility. Where such a sinking fund has been set up and invested, a change in the rates of depreciation would, of course, directly affect the property held in that fund.

The method of "straight line" accounting employed by the appellant telephone company does not, however, affect directly or indirectly the amount or character of any capital or surplus account. What is done is to present a picture of the present state of the company's depreciable property. The original book cost is indicated and also the amount which will be necessary sooner or later to be expended, to preserve the investment.

A change in the rate of depreciation does not mean the taking of any money out of the capital accounts, nor out of the surplus, but merely that the picture presented by the balance sheet is changed by showing that a less amount will be necessary to preserve the investment than as previously indicated.

This picture of conditions is equally important to the company and to the regulatory commission: That each may be apprised of the actual conditions as they exist with respect to the status of the plant investment.

It is important that the reserve for depreciation be sufficient in amount, as otherwise the company might distribute in dividends moneys which should be applied to the retirement of property.

It is equally important that the depreciation reserve shall not be excessive, as pointed out by this court in the *Lindheimer* case. This results in earnings being "plowed under" into the capital accounts, so that the stockholders are paid dividends upon moneys actually contributed by the ratepayers. In addition to this, it is pointed out by practical accountants that excessive rates of depreciation serve to build up *secret reserves*. It is said of the policy of main-

taining excessive depreciation reserves, in *Kester* on *"Accounting, Theory* and *Practice,"* Volume 2 (The Ronald Press Company, 1918), pp. 204 to 205:

> "The effect of such a policy, if operated without check, is to create what is known as a 'secret reserve.' The value of the asset is charged more rapidly against operation than the asset actually wastes. Hence the books show a reserve sufficient to cover the cost of asset while there are still values remaining in the asset. In other words, the business possesses an asset of value which is carried on the books as of no value. Were the real present value of the asset brought on the books, the contra credit would appear in some surplus or *profits* reserved account. Such would constitute a true record of the item, openly stated. So long as the asset remains concealed, i. e., without record on the books, its contra credit is also latent and constitutes a *secret* reserve of profits.
>
> "A too liberal depreciation policy, if recognized and adjusted at the time of a reappraisal, will require a separation from the depreciation reserve of the portion brought about by the overallowance, and its showing as a part of the surplus. When so handled, an overcharge for depreciation has no permanently bad effect except as it may show, for purposes of comparison, too high costs of production for the period overburdened. However, it may be and sometimes is, used for purposes of fraud and therefore, as a fixed policy, the practice of the secret reserve is to be condemned."

It is, of course, true that if a utility is compelled in a rate case to set up too low a figure for its depreciation for the purpose of establishing the rate base, it will result that the rates established for the service of the utility to its patrons may be so lowered as to affect the return on its investment. However, this cannot happen until a rate case actually arises and the rates to patrons are actually re-

duced so as to affect the earnings of the company. In such case, there may be actual confiscation of property. However, the mere fixing of the reserve for depreciation at too low a figure for the purpose of accounting does not have this result. It results only, as we have said, in a figure on the balance sheet which may be too low. If so, the company is at liberty for purposes of management and operation to disregard it, and to substitute therefor the purpose of their own calculation, such figure as they deem proper. Stated differently, the rate of depreciation fixed by a regulatory commission for the purpose of accounting to that commission does not necessarily bind the company to regard that figure as the proper figure for the purpose of management and operation.

Indeed, as we conceive it, there is nothing in the Uniform System of Accounts prescribed by the Interstate Commerce Commission, and shown in the record here, to prevent the utility from complying with the request of the regulatory commission in setting up the depreciation reserve in accordance with its requirements, and, in addition, carrying a separate account representing the difference between their own estimate of the required depreciation reserve and that prescribed by the commission. This might, indeed, be done under the express terms of the Uniform System of Accounts, for the purpose of developing the fact that the Commission was mistaken and securing a revision of its order at a later date.

The provision to which we have reference is that part of the order of the Interstate Commerce Commission, made with regard to the adoption of the Uniform System of Accounts on November 11, 1932:

> "It is further ordered, That any such carrier or any receiver or operating trustee of any such carrier, in

addition to the accounts hereby prescribed, may, unless otherwise ordered, keep any temporary or experimental accounts the purpose of which is to develop the efficiency of operation: Provided, however, That such temporary or experimental accounts shall not impair the integrity of any primary account hereby prescribed." (R., p. 202.)

We also refer to the provisions contained in the instructions in said Uniform System of Accounts 2. * * * (C) * * * (3) (R., p. 206):

"Temporary or experimental accounts may be kept in addition to the accounts prescribed herein, for the purpose of developing the efficiency of operations, etc., provided such accounts do not impair the integrity of any accounts prescribed herein."

The fact that an accounting order does not affect the property of the company until actually applied in a rate case, was recognized by this court in the case of *State Corporation Commission for the State of Kansas* v. *Wichita Gas Company*, 290 U. S. 561. That case had to do with an investigation made by the Kansas Commission into the charges made by holding companies for service rendered and commodities furnished to certain distributing companies furnishing natural gas to consumers in Kansas. It directed them to give the Commission such information as they might see fit and as the Commission might require. It ordered them to show cause why charges made by any holding company, if found unreasonable, should not be disallowed as operating expenses. After extensive hearings, the commission entered two orders,—the first of which directed the distributing companies to cease setting up as an expense item payment to the pipe line company for gas in excess of 30c per thousand cubic feet, and to give no con-

sideration to the payments so disapproved in fixing rates to domestic customers. The court says, as to this order (pp. 568 to 570):

> "The first order does not purport to establish or prescribe prices to be paid by the distributing companies to the pipe line company or purport to establish any rate to be charged by appellees to their customers. It merely directs the distributing companies not to include in their operating expense accounts more than 30 cents per thousand cubic feet for gas furnished by the pipe line company and not to consider any payments in excess of that price in fixing a rate for domestic consumers.
>
> "We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted. *Terrace* v. *Thompson,* 263 U. S. 197, 214, 68 L. ed. 255, 44 S. Ct. 15. Appellees in substance suggest that, unless now adjudged invalid and enjoined, the findings and directions of the commission in respect of their operating expenses and the fixing of rates will be binding upon them in later proceedings for the prescribing of rates to be charged by them for gas furnished to consumers and in suits involving the validity of such rates. But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. *Prentis* v. *Atlantic Coast Line R. Co.,* 211 U. S. 210, 227, 53 L. ed. 150, 159, 29 S. Ct. 67; *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418, 452, et seq., 33 L. ed.

970, 977, 10 S. Ct. 462, 3 Inters. Com. Rep. 209, but the decisions of state courts reviewing commission orders making rates are res adjudicata and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. *Detroit & M. R. Co.* v. *Michigan R. Commission*, 235 U. S. 402, 405, 59 L. ed. 288, 289, 35 S. Ct. 126; *Napa Valley Electric Co.* v. *Railroad Commission*, 251 U. S. 366, 373, 64 L. ed. 310, 313, 40 S. Ct. 174, P. U. R. 1920C, 849. The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. *Bacon* v. *Rutland R. Co.*, 232 U. S. 134, 138, 58 L. ed. 538, 539, 34 S. Ct. 283; *Missouri* v. *Chicago, B. & Q. R. Co.*, 241 U. S. 533, 542, 60 L. ed. 1148, 1155, 36 S. Ct. 715; *Ex parte Young*, 209 U. S. 123, 166, 52 L. ed. 714, 732, 28 S. Ct. 441, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. And upon the issue of confiscation vel non they are entitled to the independent judgment of the courts as to both law and facts. *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287, 289, 64 L. ed. 908, 914, 40 S. Ct. 527, P. U. R. 1920E, 814; *Bluefield Waterworks & Improv. Co.* v. *Public Serv. Commission*, 262 U. S. 679, 689, 67 L. ed. 1176, 1181, 43 S. Ct. 675; *United R. & E. Co.* v. *West*, 280 U. S. 234, 251, 74 L. ed. 390, 411, 50 S. Ct. 123.

"It results, therefore, that appellees in their complaints failed to state facts sufficient to entitle them to a decree enjoining the appellants from enforcing the first order for as insisted by appellants in oral argument in this court, the challenged provisions are merely preliminary steps in aid of investigations for the ascertainment of the reasonableness of appellee's rates, and they have no binding force in respect of payments to the pipe line company or rates to be charged consumers and cannot be res adjudicata. The decree in so far as it enjoins enforcement of the provisions of that order will be vacated."

As pointed out by the court in the Wichita Gas Company case, just examined, the action of the State Commission in the instant case is to be regarded merely as a preliminary step taken at this time for future reference in cases having to do with the fixing of appellant's intrastate exchange and toll rates. The orders of the State Commission do not constitute *res judicata*. *Holmberg* v. *C. St. P. M. & O. Ry. Co.*, 115 Neb. 727.* When and as such rate cases arise, the order may be considered as to whether it is confiscatory in its effect. It is plain that at the present time it has no such effect.

**Point 4**

**The Nebraska State Railway Commission had jurisdiction to fix the rates of depreciation to be employed by appellant as to its Nebraska property used in intrastate operations, and its jurisdiction was not affected either (1) by the provisions of Section 20 of the Interstate Commerce Act, bestowing upon the Interstate Commerce Commission jurisdiction over uniform accounting of telephone companies engaged in interstate commerce; or (2) by the provisions added to said section by the Transportation Act of 1920, authorizing the Interstate Commerce Commission to prescribe depreciation charges for such telephone companies, since the Interstate Commerce Commission had not assumed to fix depreciation charges under said section to be applicable in the year 1934.**

It is urged by appellant that the order appealed from is void for the reason that the action already taken by federal authority respecting accounting by appellant for the expenses of depreciation completely occupied the field of

*This case was reversed on other grounds in *C. St. P., M. & O. Ry. Co.* v. *Holmberg*, 282 U. S. 162.

regulation of that subject, and precluded any regulation thereof by state authority.

We must not confuse the regulations promulgated by the Interstate Commerce Commission with regard to uniform accounting with the rules prescribed for the purpose of fixing depreciation charges. It is true that the Interstate Commerce Commission had promulgated a uniform system of accounts long prior to the entry of the order in this case, and that, as a necessary incident, depreciation was required to be accounted for in these accounts. However, the power to fix depreciation charges was not bestowed upon the Interstate Commerce Commission until the amendment of Section 20 (par. 5) by the Transportation Act of 1920, and we have heretofore in this brief pointed out that the effective date of the rules adopted looking toward the ultimate establishment of depreciation charges by the Interstate Commerce Commission was postponed from time to time, the date fixed by the order of June 5, 1933, being January 1, 1935; that no proceedings were pending which contemplated the fixing of depreciation charges to be applicable to, or to be included in any accounts for the year 1934; that such proceedings as were pending had to do with depreciation charges to be effective subsequent to January 1, 1935.*

*We might, in addition, point out that after the order entered in this case on April 9, 1934, the Federal Communications Act was passed by the Federal Congress, effective June 19, 1934; that the proceeding for determination of depreciation rates was taken over by the Federal Communications Commission as Docket 2552, and the effective date of the orders theretofore made by the Interstate Commerce Commission in Docket 14700 and the Federal Communications Commission in Docket 2552 were by Order No. 10-B, dated May 1, 1935, indefinitely postponed by the Federal Communications Commission. Appellant having in a footnote on page 34 of its brief seen fit to refer to the proceedings pending before the Federal Communications Commission, it would seem proper to refer to their present status.

It seems to be appellant's contention, however, that the exercise of jurisdiction by the Interstate Commerce Commission over accounting generally, has ousted the Nebraska State Railway Commission from that field. An attempt is made to distinguish between jurisdiction for accounting and jurisdiction for regulation. We do not think that accounting may be so easily divorced from regulation. Jurisdiction for the purpose of accounting can be sustained only on the theory that it is a necessary incident to regulation. The purpose of Congress in authorizing the Interstate Commerce Commission to prescribe a uniform system of accounts for carriers was to enable the Commission intelligently to perform its duties with respect to regulation; to ascertain whether forbidden practices and discriminations were concealed in certain accounts; whether charges of expense were made against one part of their business which ought to be made against another; and to give such information as might be of value with respect to the regulation of rates. *Kansas City Southern Ry.* v. *U. S.*, 231 U. S. 423; *I. C. C.* v. *Goodrich Transit Company*, 224 U. S. 194.

We steadfastly maintain that there is nothing in the mere fact of the bestowal of accounting jurisdiction over companies engaged in interstate business, upon the Interstate Commerce Commission, which necessarily ousts state commissions from control of that particular phase of regulation so far as concerns intrastate operations.

The exercise of dual authority in the field of regulation as between Federal Commissions and State Commissions is not a new problem. The same problem is presented by the dual control exercised over common carriers by rail by the Interstate Commerce Commission and the various State Commissions,—the chief difference being that in the

case of carriers by rail by far the greater volume of business is in most instances interstate, whereas with regard to telephone companies by far the greater volume of business,—perhaps 85 to 90 per cent, is intrastate.

It is well settled that the mere fact that a portion of the property of a common carrier may be devoted to interstate commerce does not remove it from the control of the state and place it under sole federal supervision under the provisions of the Interstate Commerce Act.

A case has recently been decided by the Circuit Court of Appeals for the eighth circuit, which originated in Nebraska, and by reason of an order of the Nebraska State Railway Commission, which is extremely instructive upon this phase of the controversy. We refer to the case of *Missouri Pacific Railroad Corporation in Nebraska* v. *Nebraska State Railway Commission*, (C. C. A. 8th Cir.) 65 Fed. (2d) 557. The Missouri Pacific Railroad Corporation was operating a belt or switching railway, located wholly within the city of Omaha. It was directed by the Nebraska State Railway Commission to receive shipments originating on the lines of other and competing carriers and to deliver them at its team or public sidetracks on the payment of a prescribed switching charge. It was the contention of the railroad company that many of the shipments handled involved interstate commerce, and that even though the facility in question was located wholly within the State of Nebraska, the Nebraska State Railway Commission had no jurisdiction to direct a joint use of the belt line and team tracks with competing railroads, nor had it the right to prescribe charges for such use.

It was contended there, as here, that Congress, by virtue of the Interstate Commerce Act, had committed to the In-

terstate Commerce Commission full control over the rates, service and facilities of common carriers so far as they were engaged in Interstate Commerce, and that this excluded the Nebraska Railway Commission from exercising jurisdiction in that behalf. This proposition was ruled adversely to the contention of the railroad company and on petition for writ of certiorari this court refused to review the decision (78 L. ed. 78).

An examination of the authorities which deal with the right of the Interstate Commerce Commission to exercise control over intrastate commerce convinces us that it was never the intention of Congress to vest the Interstate Commerce Commission with any jurisdiction as to intrastate matters, except only so far as it might be necessary to the effective regulation of interstate commerce. Where the nature of the regulation required is such that it must of necessity affect both interstate and intrastate commerce, because they are so interwoven and interlocked that it is impossible or impracticable to treat them separately, it is undoubtedly true that the jurisdiction of the Interstate Commerce Commission would be exclusive; but where it is possible for the State Commission to exercise jurisdiction solely over the intrastate business and to do so without interference with interstate business, we think this may be done.

Such dual control is not contrary to the purpose and intent of the Interstate Commerce Act, which was not designed to interfere with purely intrastate commerce, but to leave such commerce under the control and regulation of state commissions so far as it might be possible to do so without impeding, interfering with, or unduly burdening interstate commerce.

An illustration of this principle is afforded by *Board of Railroad Commissioners* v. *Great Northern Railway Company*, 281 U. S. 412.

In that case it is clearly pointed out that the Interstate Commerce Commission and state commissions each have their proper sphere in the making of rates, and that it was not the intention of the Congress to circumscribe the power and authority of state commissions in that regard unless, and except, the rates fixed by the state commissions are unduly discriminatory as against interstate traffic, and, therefore, subject to revision under the 13th Section of the Interstate Commerce Act.

This court in that case quoted with approval from the case of *Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 590, 591, as follows:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

Again, where abandonment has been sought under the provisions of Section 1 (18) of the Interstate Commerce Act, this court has held that the Interstate Commerce Commission has no authority to authorize discontinuance of a

purely intrastate portion of a railroad whose situation and ownership are such that interstate and foreign commerce will not be burdened or affected by a continuance of that portion.

*State of Texas* v. *Eastern Texas Railroad Company*, 258 U. S. 204.

In *Grand Trunk Railway Company* v. *Michigan Railroad Commission*, 231 U. S. 457, the expressions of the court afford a criterion as to the general policy of the Congress over the matter of control of intrastate traffic, which we think has never been departed from.

Paragraph 2 of the syllabus is as follows:

> "Congress has not so taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc., of interstate railways as to invalidate all state regulations relative to the interchange of traffic."

Likewise in the Los Angeles Depot cases, both in the case reported in 264 U. S. 331, and in the case reported in 283 U. S. 380, it was recognized that the State Commission of California had, and might exercise, far-reaching and potent authority with regard to the construction of a union terminal station at Los Angeles, even though the terminal in question also served interstate traffic.

Appellant strenuously insists there is such essential conflict between compliance with the uniform system of accounts prescribed by the Interstate Commerce Commission and the fixing of depreciation charges for the year 1934 by the Nebraska State Railway Commission that the jurisdiction of the latter to fix such depreciation charges as an incident of its general power of regulation over telephone companies must yield to the Federal power of regulation

as exercised in prescribing the uniform system of accounts. Appellant, however, has totally failed to point out any such essential conflict.

As we have heretofore pointed out in this brief, there is a distinction between a uniform system of accounting, wherein provision is made for depreciation accounts, but no rules prescribed for determining the amount of depreciation charges, and a system of orders and rules adopted by the Interstate Commerce Commission providing a course of procedure looking to the prescription of such depreciation charges, themselves, by the Interstate Commerce Commission.

We may consider the provisions of the uniform system of accounts with regard to depreciation charges only so far as they were applicable on April 9, 1934, the date of the Commission's order here complained of.

Since the effective date of the First Revised Issue Uniform System of Accounts for Telephone Companies (Exhibit 7) had been postponed from January 1, 1933, to January 1, 1935 (R., p. 4), the rules and regulations with regard to estimates to be made and data to be furnished by the companies as contained in Rule 80 (R., pp. 210-212) were not in effect when the order complained of was entered by the State Commission. Not even the provision set out on page 33 of appellant's brief, to-wit:

> "'the company's estimates of composite annual percentage rates computed in accordance with instruction 80 shall be used prior to the date rates prescribed by this commission become effective.' (Instruction 81 (C), R. 212-213.)"

was effective.

The only regulation, if it is a regulation, that was effective April 9, 1934, when the Commission made its order was the *proviso* contained in the order of the Interstate Commerce Commission of date June 5, 1933, postponing the effective date of the First Revised Issue, Uniform System of Accounts for Telephone Companies to January 1, 1935, to-wit:

> "*Provided*, That nothing in the foregoing shall be construed as relieving telephone companies from accounting for depreciation by the application to the primary plant accounts of composite annual percentage rates based upon the best estimates available of service lives and salvage values, as required by the Uniform System of Accounts for Telephone Companies, First Revised Issue."

This we take to be merely a permissive provision. It is not to be considered as an approval, without consideration, of any depreciation rates which the company might see fit to adopt for its own use. The company-made rates were not consecrated.

Where rates of depreciation had been prescribed on intrastate property used in intrastate operations by a commission validly empowered so to do as a necessary incident to its power of regulation of intrastate business, the company would not be violating the rules of the Interstate Commerce Commission if it complied with the order of the state commission and made such correction in its rates of depreciation as was necessarily involved in a compliance with the orders of the State Commissions.

Finally, we believe that the decision of this court in the case of *Smith* v. *The Illinois Bell Telephone Company*, 282 U. S. 133, precludes all real objections to the exercise of

the power of fixing depreciation charges as a necessary incident to regulation by a state commission,—at least until the Interstate Commerce Commission or its successor, the Federal Communications Commission, shall have acted. This court said in that case:

> "The company urges that, as Congress has granted jurisdiction to the Interstate Commerce Commission over the depreciation rates of telephone companies doing an interstate business (Interstate Commerce Act, Sec. 20 (5), as amended by Transportation Act (February 28), 1920, U. S. C. title 49, Sec. 20), this subject is now completely withdrawn from the power of the state. It is said that two rates of depreciation cannot be charged on the same property. The Interstate Commerce Commission has had the matter under consideration (Re Telephone & R. Depreciation Charges, 118 Inters. Com. Rep. 328-333), but, so far as we are advised, a final determination has not yet been made. The Interstate Commerce Commission has its accounting rules with reference to depreciation charges and, pending its order under Sec. 20 (5) of the Interstate Commerce Act, telephone companies, as well as others subject to the act, have been directed to continue to observe these requirements. The company argues that, although the Interstate Commerce Commission has not finally ruled, the action taken by Congress excludes the jurisdiction of state tribunals under familiar principles. *Northern P. R. Co.* v. *Washington*, 222 U. S. 370, 378, 56 L. ed. 237, 239, 32 S. Ct. 160; *Pennsylvania R. Co.* v. *Public Service Commission*, 250 U. S. 566, 569, 63 L. ed. 1142, 1145, P. U. R. 1920A, 909, 40 S. Ct. 36; *Oregon-Washington R. & Nav. Co.* v. *Washington*, 270 U. S. 87, 102, 70 L. ed. 482, 488, 46 S. Ct. 279. We are unable to assent to this view. As the Interstate Commerce Commission has not acted finally in the matter, we are not now called upon to consider the scope of its authority in relation to depreciation charges, but we are of the

opinion that, in any event, until action has been taken which could be deemed validly to affect the amount to be charged to depreciation in connection with intrastate business so as to affect intrastate rates, the prerogative of the state to prescribe such rates, and the jurisdiction and duty of the statutory court in considering their validity to determine the amount properly allowable for depreciation in connection with the intrastate business, are not to be gainsaid. Compare *Railroad Comrs.* v. *Great Northern R. Co.*, 281 U. S. 412, 74 L. ed. 936, 50 S. Ct. 391. Accordingly, the court should make appropriate findings with respect to the amount to be allowed in this case as an annual charge for depreciation in connection with the intrastate business." (pp. 159-160.)

See also:

*Indiana Bell Telephone Co.* v. *Public Service Commission,* 300 F. 191, 205.

Appellant contends that the *Smith* case is not to be followed as a binding precedent here for the reason that this is purely an accounting case, whereas the *Smith* case was a rate case in which the court had under consideration the reasonableness of the rates prescribed by the State Commission and that the State Commission there fixed a proper charge for depreciation only as a necessary incident to arriving at a proper rate base.

We cannot, however, distinguish these two cases in principle. The Nebraska State Railway Commission has plenary jurisdiction over the rates, service and general control of all common carriers within the state, including telephone companies. (See sub-title "Jurisdiction of State Commission" in statement.) For the purpose of such regulation it has exercised the power of prescribing depreciation charges. It is true that the matter of these charges is not

of present moment in any rate case now pending before the State Commission, as it was in the *Smith* case, but the matter of proper depreciation charges will undoubtedly be of vital importance in future rate cases before the State Commission, in which the Northwestern Bell may be involved. Stated differently, in the *Smith* case the matter of proper depreciation charges was a material matter for present application in a rate case. As regards the instant order made by the Nebraska State Railway Commission, the matter of proper depreciation charges is not a matter for present application, but is a matter for future application in rate cases, when and as they may arise. However, the power to fix such charges will be equally as important to the patrons of the Northwestern Bell Telephone Company when and as rate cases arise, as it was to the patrons of the Illinois Bell Telephone Company in the *Smith* case, where a rate case was already pending.

We insist that since no action had been taken by federal authority to fix rates of depreciation for application to the property of appellant located in Nebraska and used in intrastate operations, the power subsisted in the State Commission to fix such rates.

Whether the State Commission might so act after the Federal Commission had acted, is not involved in this case and need not and should not be considered here.

**Point 5**

**The order made by the Nebraska State Railway Commission was not in conflict with the regulations and orders of the Interstate Commerce Commission then in force prescribing the rules, principles and methods pursuant to**

**which appellant was required to account for the expenses of depreciation.**

The supplemental order of June 5, 1933, entered by the Interstate Commerce Commission in Docket 14700, which postponed the effective date for depreciation accounting to January 1, 1935, carried the following provision (R., p. 5):

> "*Provided*, That nothing in the foregoing shall be construed as relieving telephone companies from accounting for depreciation by the application to the primary plant accounts of composite annual percentage rates based upon the best estimates available of service lives and salvage values, as required by the Uniform System of Accounts for Telephone Companies, First Revised Issue."

It must be apparent, therefore, that the provisions of the said First Revised Issue of the Uniform System of Accounts for Telephone Companies, the pertinent portions of which are set out in the record from pages 203 to 214, inclusive, are not applicable to reports required to be made to the Interstate Commerce Commission for the year 1934, except as indicated in the above *proviso* in the order of June 5, 1933.

The Interstate Commerce Commission requested Class A telephone companies to submit not later than March 1, 1934, a schedule of the rates by primary accounts which they proposed to apply during that year, together with a statement of the estimated service lives and salvage values upon which such rates were based. It was particularly stated in Depreciation Section Circular No. 7:

> "In order that the Commission may be informed as to the rates contemplated for use by the respective companies for the year 1934, each Class A and Class B

telephone company is requested to submit not later than March 1, 1934, a schedule of the rates by primary accounts which it proposes to apply during that year, together with a statement of the estimated service lives and salvage values upon which such rates are based.

"In view of the fact that the estimated rates covered by the schedules to be submitted by Class A companies August 1, 1934, and by Class B companies August 1, 1935, must be accompanied by the necessary supporting data, and it is assumed that the preparation of these is receiving appropriate consideration at this time, the only requirement with respect to the rates submitted in response to this request is that the service lives and salvage values shown shall be based upon the best information readily available. In other words, for the purpose of the returns (fol. 10) to be made under this circular the details supporting the service lives and salvage values used will not be required." (R., p. 5.)

The Commission, in its General Order No. 59, required Class A telephone companies to submit not later than March 1st, their schedule of depreciation rates by primary accounts, together with such supporting data as required by the Interstate Commerce Commission by Circular No. 7, Depreciation Section Series (R., p. 9). These schedules were filed with the Railway Commission (R., pp. 10 to 17).

It will thus be seen that the schedules and data filed with the Commission were in strict conformity with the only requirements insisted upon by the Interstate Commerce Commission for depreciation accounting in connection with reports to be filed prior to January 1, 1935.

What the Commission did was to examine the responsible members of the appellant telephone company's staff,

who had prepared the same, and to introduce testimony of its own bearing upon the same subject-matter.

It then, acting within its regulatory powers, fixed a rate of depreciation to be applied for the year 1934 upon the intrastate depreciable property of the appellant.

Appellant contends that this action is in conflict with Article VI, paragraph 2, of the Constitution of the United States, because "it is directly in conflict with the requirements validly imposed by the Interstate Commerce Commission." Before addressing ourselves to the specific objections set out by counsel, we would call attention to the expressions of the Interstate Commerce Commission itself, as contained in its report preliminary to its order of July 28, 1931, Docket 14700, Depreciation Charges of Telephone Companies, 177 I. C. C. 351. In the finding in this report, which had to do with the matter of procedure which should be set up by the Commission for the purpose of fixing depreciation rates, the Commission says:

> "In the case of telephone companies such estimates and the accompanying statements shall be filed, within the time prescribed, with the State Commission or Commissions having jurisdiction over the particular company, * * *." (P. 446.)

The finding then proceeds:

> "In the case of steam railroad companies this commission shall, after an office check, prescribe by temporary order the percentages of depreciation which shall be charged with respect to each class of property of each company, and in the case of telephone companies this commission shall by temporary order prescribe similar depreciation percentages, following the recommendations of the State commissions to the extent that such advice can be procured." (P. 446.)

The finding then provides for public hearings after the issuance of the temporary orders, and continues:

> "In the case of telephone companies, such public hearings shall be conducted for this commission, so far as possible, by State commissions."

We call attention to the fact that the Interstate Commerce Commission directed the required data to be filed in the first instance with the State Commission having jurisdiction over the particular company. This recognizes a regulatory authority in the State Commission over the telephone companies which would be affected by the order.

It then provides for the issuance of temporary orders, based upon the recommendations of the State Commissions, to the extent that such advice can be procured. This recognizes the fact that the state regulatory commissions may propose changes or alterations in the rates which the telephone companies may be proposing to apply; and, in effect, directs that such changes and alterations shall be given temporary effect by the mandate of the Interstate Commerce Commission until public final hearing is had by the Interstate Commerce Commission.

It is further provided that the public hearings which are to be had are to be conducted so far as possible for the Interstate Commerce Commission by the State Commissions.

We cannot discern from the above any purpose on the part of the Interstate Commerce Commission to deny regulatory jurisdiction to the Commissions over intrastate matters. Neither can we discern any purpose to require the State Commissions to adhere rigidly to any set of rules laid down by the Interstate Commerce Commission to the exclusion of changes or alterations that might be suggested

therein by the State Commissions. On the contrary, the Interstate Commerce Commission seems to invite full cooperation on the part of the State Commissions. It gives effect as a temporary proposition to such changes or alterations as they may make in the rates proposed by the company and finally provides that the public hearing which shall be had shall be conducted for the Interstate Commerce Commission by the State Commission.

We discern nothing in the provisions of the order of June 5, 1933, nor in those of Depreciation Section Circular No. 7, to which we have above adverted, which in any way detracts from the expressions of the Interstate Commerce Commission in its order of July 28, 1931. We are satisfied that there is no provision in the order of the State Commission which in any way conflicts with the rules of the Interstate Commerce Commission in effect at the date it was entered.

We will now consider appellant's specific objections.

1. **Accounting Separately by Classes of Plants**

There is nothing either in the supplemental order of June 5, 1933, nor in the Depreciation Section Circular No. 7, requiring a separate rate of Depreciation to be set out for each of the twelve different classes of telephone plants. That was a totally new provision introduced for the first time by the First Revised Issue, Uniform System of Accounts for Telephone Companies, and had not, of course, come into effect at the time the order in this case was made, but, even if the rules of the Commission can be so stretched as to be taken to require the application of separate percentage rates to the various classes of depreciable telephone plants, still this would not militate against the

validity of the order entered by the Commission. It is complained that an annual composite percentage is prescribed for application to all depreciable property, and that this cannot be broken down into proper components to apply to the twelve separate plant accounts.

In its schedules filed February 28, 1934, before the Nebraska State Railway Commission, the appellant, as Schedule 1, Sheet 1, filed a schedule of property included in telephone plant accounts as of January 1, 1934, and depreciation percentages for use during the year 1934. Column 1 gives the number and title of primary accounts covering depreciable property. Column 2 gives their ledger value January 1, 1934. Column 3 gives the depreciation rates proposed to be applied to each account. Column 4 gives the estimated annual depreciation charges.

At the foot of the statement appears the following:

> "Estimated annual composite rate of depreciation for all depreciable accounts—determined by dividing the total estimated depreciation charges shown in column 4 by the total ledger value of all depreciable accounts shown in column 2....4.48%." (R., p. 10.)

It is this rate which is referred to by the Commission as the rate of depreciation proposed by the company, and in place of that rate the Commission prescribed a rate of 3.5%.

It must be apparent that the amount of the estimated annual depreciation charges for each account bear a certain ratio to the total thereof. Having ascertained that ratio, it should be a simple matter of mathematics to break down the composite rate prescribed by the Commission into such components as will reduce the separate depreciation

rate for each primary account, in due proportion. This calculation could not, perhaps, be readily made monthly, but it certainly could be made at the end of the accounting period and the proper correction entries made at that time.

### 2. Straight-line Depreciation Accounting

Neither the order of June 5, 1933, nor Depreciation Section Circular No. 7, issued by the Interstate Commerce Commission, contain any reference to straight-line accounting. However, we have little objection to assuming, since the company had adopted that system, that it would be required to adhere to it, the more because we are convinced that the order of the Commission did not interfere with the pursuit of that method by the company. Appellant, in its brief, seems to seek to convey the idea that estimates for the purpose of depreciation charges are fixed and definite quantities and that they may not be changed and varied once it has been determined what aliquot part is to be assigned to each accounting period. We do not so construe the straight-line system of accounting. It is true that an estimate is made of service life and salvage value and that the residue is divided into parts equal in number to the number of accounting periods,—that is, normally, into a number of parts corresponding to the number of years of service life. However, these estimates of service life and salvage value are not constant. They are variables. They are based on studies of the experience of the company and on the judgment of engineers as to what the future will bring. They must constantly be revised in the light of experience. This was recognized by the Interstate Commerce Commission in its order in Docket 14700, Depreciation Charges of Telephone Companies, 177 I. C. C. 351. The Interstate Commerce Commission said:

"In connection with this general subject, also, the question arises as to how errors in depreciation rates which are brought to light by further experience and subsequent check shall be corrected, so far as the depreciation reserve is concerned. As indicated above, one of the claims advanced for the unit basis is that it results in an automatic adjustment of errors. This claim, however, rests upon a misapprehension. It is true that under that basis the depreciation charges on account of a unit stop when it has reached the estimated average life, and that if it is retired short of that life any deficiency in the accruals is charged to operating expense. But clearly this manner of automatic adjustment will not correct the current charge to operating expense on account of depreciation, if the depreciation rate is in error. Nor will it necessarily correct the depreciation reserve, in view of the large amount of property always existing, particularly where the plant is growing, which neither has been retired nor yet has reached the average age. Verification of the depreciation reserve, as has already been shown, must depend upon the verification of the depreciation rates. If the latter are found to have been wrohg in the past, the depreciation reserve will be wrong, whether the group or the unit basis be employed. The natural procedure, under such circumstances, would be to correct the reserve gradually, either up or down, by appropriate modification of the depreciation rates for this purpose." (pp. 446-447.)

The State Commission became convinced that the rates of depreciation which had been applied in the past were too high; that the factor of inadequacy which had been taken into account during the last decade on account of the growth and development of the company no longer had as important a place as it formerly had; that the conversion of the type of service from magneto and grounded circuit to common battery, metallic circuit, and in case of the larger

exchanges to dial equipment, had progressed about as far as it naturally would; that the reserve already set up by the company was excessive,—that is to say, it was more than sufficient to replace the capital of the company which might be retired during the present service life of the plant now in operation. The method adopted was to lower the annual composite percentage rate for all depreciable property for the year 1935. The idea was not to provide for retirements during that year, but so to adjust the total of the reserve that it would perform its proper function. This is exactly what was done by the Illinois State Commission in the case of *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151, and the action of the Commission there was held to be justified by this court.

It is claimed by the appellant that the Nebraska Commission, itself, has recognized that the order in this case is inconsistent with straight-line depreciation accounting, and in proof of that fact reference is made to decision entered by the State Commission November 27, 1935, fixing the 1935 depreciation rate for appellant. A quotation from that decision is set out on page 55 of the brief. The language used by the Commissioner who wrote the opinion is not readily understandable taken out of its context. What he undoubtedly intended to convey was that in fixing the rate for 1934, the Commission did not have in mind to set aside an equal aliquot part of the service value, but sought, rather, to make such allowance as would correct excessive allowances made in past years. When he speaks of the straight-line having been broken, he refers, of course, to a graph which would represent the annual charges for depreciation. If these were excessive the graph representing them would, instead of a straight line, be a series of broken lines, rising above the horizontal co-ordinate axis.

It would be necessary in that case to continue the graph by a descending line. If what the Commission said in 1935 has any bearing upon the order made by it in 1933, it would be fairer to quote what is said in that order after the portion which is quoted in the brief on page 55. In order that the court may not be misinformed in this matter, we quote here the entire statement made by the State Commission, which we think bears out all that we have said:

THE TEST OF EXPERIENCE

"In our report to the Interstate Commerce Commission, we recommended an overall composite annual depreciation rate of 3.18%. This was based upon company's retirements for 1933. Our purpose was to prevent a further increase of balance in account for accrued depreciation. We recognized then that we were not following the straight line method of depreciation accounting, but the line had already been broken by the economic depression; inadequacy had ceased to be a factor in current operation. We now hold that the experience of a single year does not form a sound basis for estimating future depreciation rates. On the other hand, we hold that company's actual experience with retirements covering a period of time which equals or approaches to an average turnover or cycle of all depreciable property, forms a sound basis for estimating future depreciation rates.

We have such a turnover or cycle or a close approach to it in the experience of Nebraska Telephone Company from 1913 to 1920, and the experience of the Northwestern Bell Telephone Company from 1921 to 1935 for the Nebraska and South Dakota area. Our accounting department has prepared the following data from annual reports of Nebraska Telephone Company from 1913 to 1921, and from exhibit 23 submitted by respondent at our request for the Northwestern Bell Telephone Company from 1921 to 1935.

The latter has been corrected to exclude property not considered depreciable by revised Uniform System of Accounts and made effective January 1, 1933. The former has not.

**Northwestern Bell Telephone Company**
**Nebraska-South Dakota Area**
**Depreciable Plant and Credits and Debits to the Depreciation Reserve**
**Period Year 1913 to 1934, Inclusive**

| Year | A Depreciable Plant | B Debits to the Depreciation Reserve | % Ratio B to A | C Credits to the Depreciation Reserve | % Ratio C to A |
|---|---|---|---|---|---|
| | | **Nebraska Telephone Company** | | | |
| 1913 | $ 9,174,627.15 | $ 454,343.10 | | $ 368,705.00 | |
| 1914 | 9,975,650.64 | 329,672.33 | | 468,762.00 | |
| 1915 | 10,489,390.24 | 484,022.43 | | 573,366.32 | |
| 1916 | 10,402,809.02 | 585,399.24 | | 632,266.66 | |
| 1917 | 11,102,590.23 | 293,435.73 | | 652,849.62 | |
| 1918 | 13,087,376.50 | 189,371.11 | | 579,257.53 | |
| 1919 | 14,448,389.70 | 563,400.22 | | 766,308.11 | |
| 1920 | 16,159,996.65 | 724,042.42 | | 860,362.93 | |
| | | **Northwestern Bell Telephone Company** | | | |
| 1921 | 15,721,536.67 | 477,781.52 | | 821,224.76 | |
| 1922 | 18,614,480.14 | 1,015,255.66 | | 968,354.59 | |
| 1923 | 19,974,816.99 | 347,052.93 | | 1,037,295.04 | |
| 1924 | 20,543,759.75 | 583,932.04 | | 1,064,408.80 | |
| 1925 | 21,153,610.80 | 620,151.18 | | 1,097,442.83 | |
| 1926 | 21,587,324.44 | 593,860.12 | | 1,134,247.92 | |
| 1927 | 22,007,618.66 | 630,262,41 | | 1,209,003.05 | |
| 1928 | 23,146,063.37 | 858,965.87 | | 1,278,809.18 | |
| 1929 | 24,480,092.50 | 1,007,787.74 | | 1,291,668.56 | |
| 1930 | 26,839,154,01 | 1,329,518.10 | | 1,416,571.69 | |
| 1931 | 28,386,967.19 | 1,434,331.78 | | 1,487,006.05 | |
| 1932 | 29,245,988.15 | 874,177.91 | | 1,443,757.39 | |
| 1933 | 29,108,039.48 | 450,048.52 | | 1,307,314.20 | |
| 1934 | 29,204,412.41 | 460,820.23 | | 1,319,239.34 | |
| Total 22 Years | $424,854,694.69 | $14,307,632.59 | | $21,773,220.57 | |
| Average 22 Yrs. | $19,311,577.03 | $650,346.93 | 3.37 | $989,691.84 | 5.12 |

The weighted average of debits for Nebraska Telephone Company period equals 3.82% of depreciable property. The weighted average of debits for the Northwestern Bell Telephone Company period equals 3.24% of depreciable property. The weighted average for both periods equals 3.37% of depreciable property. No part of this rate is based upon the judgment of company's engineering staff. It represents the company's actual experience for 22 years. If any part of this rate is based upon judgment, it is the judgment of the management during the 22-year period, as to when retirement should be made.

To keep the investment intact we must make an allowance for 12% existing accrued depreciation. The 12% reduced to dollars equals $3,504,529. On January 1, 1913, the Company had in reserve for accrued depreciation the sum of $1,587,400, and deducting this from $3,504,529 we have $1,917,128. By dividing the last amount by 424,854,694, the total of the average amount of depreciable property by years for the 22-year period we have a rate of .45% which added to the rate of 3.37% gives us a rate of 3.82%. We, therefore, conclude that an overall composite rate of 3.82% would have been adequate for the 22-year period to pay expense of all retirements and to have kept the investment intact. This rate gives no consideration to the fact that on account of inadequacy and improvements in the art, service life will be increased in the future.

We believe that 22 years is fairly representative of a turnover or cycle period. Company's weighted average credits to depreciation reserve for this period is 5.12% of depreciable property. This would indicate an average turnover period of 19.3 years. Company's proposed rate of 4.44% would indicate an average turnover period of 22.5 years. A rate of 3.82% would indicate a turnover period of 26.2 years. The total retirements of $14,307,632 for the 22-year period do not equal or approximate the average investment of

$19,311,557 in depreciable property. This difference arises from the excessive increase in growth of investment in depreciable property from 1913 to 1932. There has not yet been an average turnover of depreciable property. It is to us conclusive evidence that company's estimate of service life in the past has been too conservative, resulting in excessive percentage rates. Until the time that the average depreciable investment equals or approximates the total retirements, it cannot be said that we have an average turnover period. The past period of excessive growth affords no basis for future estimates. If a composite rate of 3.82% should in the future be inadequate, it can be corrected by order of the Commission. Considering the excessive balance in reserve for accrued depreciation and that inadequacy will not be an active factor until lost stations have been restored, we are of the opinion and so find that an overall composite rate of 3.82% will be adequate to keep respondent's investment intact for 1935, and that respondent should apply such rates to primary accounts as will result in an overall composite for all depreciable property in Nebraska, not exceeding 3.82%."

(Above quotation commences with, includes, and continues quotation set out in appellant's brief, p. 55.)

### (3) Rates to Be Based on Estimated Service Values and Service Life

Appellant, of course, insists that the provisions of Instruction 80 of the Uniform System of Accounts is applicable here. As we have pointed out, this provision does not govern, but only such provision as was left in force by the proviso in the order of the Interstate Commerce Commission of June 5, 1933, postponing the effective dates of depreciation accounting to January 1, 1935. Both that order, as well as the provisions of Depreciation Section

Circular No. 7, which was made a basis of the order of the State Commission requiring schedules of depreciation rates and data to be filed with it, provide that the depreciation rates applied by the company for its accounting shall be based upon the best estimates available of service lives and salvage values.

However, we need not insist upon any distinction as to the rules applicable here. The appellant, in compliance with the order of the State Commission, filed with it on February 28, 1934, a schedule of depreciable property and depreciation percentages for use during the year 1934, which included estimates of service life and net salvage value for each of its classes of property. These schedules were explained in detail by Mr. Granfield, the inventory and cost engineer of the appellant telephone company (R., p. 44), under whose direction they had been prepared (R., p. 45).

As an illustration of the nature of the testimony presented by Mr. Granfield, we set out below his testimony with reference to the computation of the annual depreciation charge for central office equipment. This was reflected in the schedules filed by the company in Schedule 2, sheet 3, appearing on page 12 of the record:

(By Mr. Forbes:)

Q. "You may state in your own way, Mr. Granfield, how you proceeded to find the rate of 5.2 fixed for annual depreciation of central office equipment?"

A. "The central office equipment account includes quite a variety of installations, and in developing the depreciation rate, we have studied each class of installation separately. We have taken the large common battery offices in one group, dial offices in another

group, magneto offices in another group, and so on. The manual offices, that is the large manual offices, have been studied by determining the average service life already realized for each office. To do that we found when it was first installed; how much was invested in it at that time, and we follow it through its history year by year, and record all of the charges against (fol. 138) the reserve in that office for partial displacements and all of the additions made. As a result of the additions and retirements in an office placed, for example, in 1915, some eighteen years ago, might today have an average service life of as much as seven or eight years, because new equipment represents a substantial investment, and has a short life or low age at the present time, and that offsets the longer age of the parts of the original installation that still remains. From that sort of study for each office, we determine the expectancy or the average life in relation to age. Then we get forecasts of the probable final retirements from every office, and from that determine the average length of time that these installations may be expected to live, from initial installation to final retirement, and that average overall age we call it, related to the average service life that's built up on the average in that period of time, gives us the average service life for that class of equipment.

"Similar methods are applied to other types of manual offices and the composite rate for all manual offices is developed.

"Then we have to take into account the dial offices; and the service life expected in the dial offices is a matter largely of judgment. We have retired several complete dial installations, but the dial offices that constitute the greater part of our present investment in dial offices, are different in many respects from those which have been retired, so that we have, as a matter of judgment, given them a substantially longer service life.

"Then there is also a substantial investment in toll terminal (fol. 139) and telegraph equipment. That is mostly relatively new equipment—the repeaters, terminals, telegraph equipment of various kinds, and the service life of that part of the investment is based largely on judgment, because nearly all of our investment in that type of equipment is only six or seven years old at the most. And we also have a small investment in miscellaneous portable equipment. That includes what was formerly known as the other equipment in central office account. That is such things as rolling ladders, wire chiefs' desks etc., and that was studied by what we call a turnover cycle method, when it was in a separate account, and we have used the results of that study for this portion of the central office equipment account.

"Then all of these component rates were composited on the basis of the investment as of January 1st this year, and the result was 5.2%. I didn't mention the salvage.

"The salvage is based on judgment related to our past experience. There was a time in the past when there was quite a field for reuse of large manual switchboards which were retired from service, but now there is practically no field for them, and the last several offices we have retired have netted but little salvage, so that salvage set-up is based on what seems to be the maximum that we could expect, in view of the present state of affairs. 5.2% was the composite result of the detailed treatment of each subdivision of the account and each individual study is quite a voluminous study, and the supporting data, when it is prepared, will have quite a volume of data and analysis for each subdivision of this account."

(R., pp. 89-90 and 91.)

He was then interrogated in detail as to various types of exchanges and the replacements and retirements neces-

sary, and particularly with reference to the factor of obsolescence and inadequacy, also as to the effect that adequate maintenance had upon depreciation charges (R., pp. 91 to 108).

The testimony as to central office equipment is illustrative with regard to the method used with each class of property. The studies of service life and salvage values made by the company was used as a basis, and to this was added the factor of judgment on the part of the valuation experts employed by the company.

To the testimony of the appellant's staff members was added certain testimony of the Commission, bearing upon matters to which we have adverted. (See statement.) This testimony covered: the ratio of depreciation reserve to the investment indicating excessive allowance for retirements (Exh. 2, R., pp. 191-193); evidence as to the estimated per cent condition of the exchange service property in Nebraska (Exh. 4, R., p. 195); evidence showing a marked degree in the growth of population of the communities served (Exh. 5, R., pp. 197-199), and evidence showing the loss in stations sustained by the company during the period of depression (Exh. 6, R., p. 200).

The State Commission considered the testimony of the members of appellant's engineering and accounting staff, as well as its own testimony, and applied to the same their informed judgment. It will thus be seen that the testimony was in fact based upon estimates of service life and service values, judged in the light not only of the informed judgment of the company's engineers, but also in the light of the informed judgment of the Commission.

We respectfully submit that there is nothing in the order of the Commission which indicates that there was any departure from any applicable rules of the Interstate Commerce Commission requiring percentage rates to be based upon service lives and service values.

## Point 6

**The order is not obnoxious to the constitutional provision guaranteeing appellant due process of law either on the ground that it requires the making of incorrect accounting entries or because it is not founded upon any evidence in the record.**

### (1) The Order of the Commission Does Not Require the Making of Incorrect Accounting Entries

Appellant insists, first: That the order, if enforced, would deprive appellant of the right to keep accurate books of accounts; and, second, that the order is intended to, and does, require the use by appellant in its accounts of depreciation rates which were less than the true rates for the sole purpose of reducing the balance in its depreciation reserve accounts.

Appellant's contention is based upon a fundamental fallacy. It assumes, first: That it is possible to ascertain with accuracy and precision the amount necessary to maintain an adequate depreciation reserve; second, that appellant has so determined the amount; and, third, that any change or alteration of that amount would produce an inaccurate and incorrect rate of depreciation.

It is then argued that to require appellant to use such changed or altered amount for the purpose of bookkeeping

or reporting to Commissions, state or federal, would be to require it to make false entries and keep inaccurate accounts.

We respectfully submit that if the State Commission has jurisdiction, as we contend, and if, after notice and hearing (if they be required) it has entered an order altering and correcting the amounts which appellant should be permitted to credit to its depreciation reserve, such amounts and such entries cannot justly be termed false and untrue.

In addition to this, as we have previously pointed out in our discussion above, under Point 3, there is nothing in the Uniform System of Accounts for Telephone Companies, First Revised Issue, which would prevent the appellant from setting up an additional reserve representing the difference between the amount of the depreciation reserve it considered necessary and the amount prescribed by the Commission, and carrying such account on its books until it was determined by the experience of the company whether the Commission had erred, or whether the Company was itself in error.

The argument of appellant seems to us rather a labored effort for the purpose of showing that appellant has in some way been affected in its property rights, a matter which we discussed fully under Point 3, above. We are satisfied that the appellant has sustained no such injury.

**(2) The Order Is Founded Upon Sufficient Evidence**

The order does not deny to appellant due process of law in that it is not founded upon any evidence in the record.

**(a) Legislative Enactment Should Not Require Support of Evidence**

The appeal in this case is, as we have pointed out, based on a federal statute under which the order of the Commission is construed as a statute of the state. If such is its nature and character (and such it would seem to be under the rule laid down by this court in *Prentiss* v. *Atlantic Coast Line R. R. Co.*, 211 U. S. 210) it should be tested by the same test as is, for example, applied to a municipal ordinance,—which need not rest on evidence, but is sufficient if it be reasonable and not otherwise unlawful in its operation. See cases examined under Point 2, subd. (b), supra.

**(b) The Order of the Commission Is, However, Based Upon Sufficient and Satisfactory Evidence**

The contention of appellant seems to be that the Commission looked solely to the discrepancy between the per cent condition of the company's property as reflected in Exhibit 4 (the accuracy of which is not challenged and which shows an estimated per cent condition in 1933 of 89%) and the ratio of the depreciation reserve to the plant investment, which, as disclosed by Exhibit 3, was on December 31, 1932, 24.24%. It is argued that this differential has no significance, and that it was improper for the Commission to take it into account.

In this position the appellant is at variance with the conclusions of the court in the case of *Lindheimer* v. *Illinois Bell Telephone Company*, 292 U. S. 151. In that case this court had to do with certain depreciation charges which had been fixed by the State Commission and which had been drawn in question in the lower federal court. In

testing the reasonableness of the allowances for depreciation reserve, this court compared existing depreciation in the property with the amount set up for depreciation reserve. It was noted that, for example, in 1931, existing depreciation amounted to $15,828,000.00 as compared with a reserve for depreciation of $48,362,000.00. The telephone company there, as in this case, strenuously objected that there was no proper relationship between existing depreciation and the depreciation reserve. Much the same arguments were made as in this case, as is apparent from an examination of the opinion (pp. 171-172). The court also considered in the *Lindheimer* case the fact that larger amounts had been expended for current maintenance than had been set off for depreciation reserve, the amounts being in the year 1931 as follows:

| | |
|---|---|
| For current maintenance..... | $10,842,053.00 |
| Depreciation ..... | 8,133,000.00 |

(p. 174)

In the instant case, there was a comparison of the amounts expended for replacement from the depreciation reserve and for maintenance. For example, for the year 1932, the amount expended for replacements and charged to the depreciation reserve amounted to $4,277,488.36 as against an amount expended for maintenance in the sum of $5,253,887.56 (R., p. 26). This court said, in the *Lindheimer* case:

> "In the light of the evidence as to the expenditures for current maintenance and the proved condition of the property—in the face of the disparity between the actual extent of depreciation, as ascertained according to the comprehensive standards used by the Company's witnesses, and the amount of the depreciation reserve—it cannot be said that the Company has es-

tablished that the reserve merely represents the consumption of capital in the service rendered. Rather it appears that the depreciation reserve to a large extent represents provision for capital additions, over and above the amount required to cover capital consumption. This excess in the balance of the reserve account has been built up by excessive annual allowances for depreciation charged to operating expenses."

There are also illustrative comparisons contained in tables set out in the concurring opinion of Mr. Justice Butler in the *Lindheimer* case (pp. 178 to 180), which afford comparative data similar to that referred to in the majority opinion in the *Lindheimer* case, and also to the data set out in the opinion or report of the Nebraska State Railway Commission, antecedent to the order which is drawn in question in this case. It would seem that the Commission was fully justified in its conclusion upon the evidence before it, that the depreciation reserve was excessive in amount. This being true, the Commission had the undoubted right to consider that fact in establishing a proper rate of depreciation.

We have previously pointed out that the action of the Commission in its order was based, first, upon schedules of the company showing their estimates of service life and service value of depreciable property (R., p. 10 to p. 17). Added to this was the testimony of Mr. Granfield, stating how these estimates had been made, and showing the degree to which judgment of himself and his subordinate associates had entered into them. Mr. Granfield was examined, amongst other things, with regard to growth or lack of growth as affecting the element of inadequacy, and also with regard to the progress which had been made in the development of telephone plants as bearing upon the ques-

tion of future obsolescence, these all being matters into which the element of judgment must necessarily enter to a large degree. Mr. Granfield stated, with regard to the matter of growth or lack of growth of the company as affecting the element of inadequacy:

> "Related to the amount of investment, it may be that the demands on the reserve in the last ten years were somewhat more than would be expected in a normal decade * * *." (R., p. 53.)

He admitted that it was generally true that towns in Nebraska from 2,500 to 5,000 where the company owned exchanges had just about experienced the growth that they will have for a long time (R., p. 54). He admitted that the towns in Nebraska had not grown in the last five or six years, and he knew of nothing that would make him expect that they would (R., p. 54). He made a somewhat grudging admission that the ordinary course of development of the telephone plants in Nebraska, as they are maintained at the present time, has gone about as far as might be expected, saying:

> Q. "In the ordinary course of development of the telephone plant, where the switchboard is operating magneto, perhaps the farm lines are grounded, and the town portion of the exchange lines are metallic the exchange has gone on, the farm lines have been made metallic, the town has been cabled, the switchboard been made common battery, isn't that about the maximum development as far as we know now in towns around twenty-five hundred to five thousand inhabitants?"
>
> A. "When that has all been done, that is about as far as we expect most of them to go now. However, there are constantly being made new developments in service. It is now possible to handle even grounded lines through automatic switching equipment, where-

as even two or three years ago it was impractical to use automatic switching equipment where any grounded lines were involved, and that precluded a change being made that might otherwise have been desirable. Also, the extent to which grounded lines are used is still considerable in Nebraska." (R., p. 55.)

He admitted that he knew of no changes in the art which might make it necessary to use a 25 million dollar reserve immediately (R., pp. 58-59).

In addition to this, it appears throughout the entire record that as to each class of telephone property the estimated service lives and service values were based not only upon studies of the experience of the company but also upon the judgment of its valuation engineers. In some instances the element of judgment bore a very large part of the estimates of service life. For instance, with regard to the service life of dial equipment, the estimate was based largely on judgment because, as stated by Mr. Granfield, "We have not had any of our own dial installations long enough to retire them, so this figure is based on the judgment as to the average service life which will be realized when the dial installations are retired" (R., p. 92).

The Commission, composed as it is of men of experience in utility affairs, must be presumed to have some knowledge of matters with which they have frequent occasion to deal. To the facts placed before them by the schedules, estimates of service life and service values of the company, as explained by the company's staff, together with other facts appearing from statistics collected under their direction by their own accountant from data and reports in their office, the Commission employed its informed judgment to revise the judgment of the company engineers, not

for the purpose of arbitrarily reducing the estimates for depreciation reserve for the year 1934, but in order that the reserve might be made truly to reflect the amount necessary to preserve the plant investment of the appellant telephone company intact. We submit that the evidence is fully sufficient and satisfactory.

## CONCLUSION

In conclusion, since, *First,* the State Commission has not trenched upon any matters committed exclusively to federal control under the Interstate Commerce clause of the Constitution, and, *Second,* appellant has not been denied due process of law nor equal protection of the law by the order of the Commission, the appeal should be dismissed.

Respectfully submitted,

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